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In The

Supreme Court of the United States

October Term, 1995

SAL F. ALBANESE, TIM CARL, LORETTA CARL, JOSEPH CAROLEI, JOHN CASTELLI, STEPHEN CLINTON, GREGORY GLOVER, TINAMARIE LAMBIASI, JOHN O'DONNELL, ELAINE POLENINI, ROCHELLE PUGLISI, TOBIAS RUSSO, TERRY SILVEIRA and VICTOR M. SUAREZ,

Petitioners,

vs.

FEDERAL ELECTION COMMISSION, SUSAN MOLINARI, COMMITTEE TO RE-ELECT SUSAN MOLINARI,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the lower courts erred in holding that a congressional candidate and his voter-supporters lacked standing to challenge the constitutionality of the congressional franking privilege, in direct conflict with *Common Cause v. Bolger,* 574 F. Supp. 672 (D.D.C. 1982) (three-judge court), *aff'd,* 461 U.S. 911 (1983).

2. Whether the lower courts erred in holding that a congressional candidate and his voter-supporters did not state a cause of action in their constitutional challenge to the congressional franking privilege, in direct conflict with *Common Cause v. Bolger,* 574 F. Supp. 672 (D.D.C. 1982) (three-judge court), *aff'd,* 461 U.S. 911 (1983).

3. Whether a congressional candidate and nonwealthy voters in congressional elections have standing to challenge the constitutionality of the campaign finance system in congressional elections.

4. Whether a congressional candidate and nonwealthy voters in congressional elections have a cause of action in their equal protection challenge to the campaign finance system in congressional elections.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions and Statutes Involved	1
Statement of the Case	2
A. Factual History	3
B. The Lower Court Decisions	6
(1) The District Court Ruling	6
The Congressional Franking Privilege	6
The Campaign Finance System in Congressional Elections	7
(2) The Second Circuit Ruling	7
Reasons for Granting the Writ	8
I. The Ruling Below Conflicts With The Holding In *Common Cause v. Bolger* That Congressional	

Contents

		Page
	Challenger Candidates And Voters Have Standing To Challenge The Constitutionality Of The Congressional Franking Privilege.	9
II.	The Ruling Below Conflicts With The Holding In *Bolger* That Congressional Challenger Candidates And Voters Had Stated A Cause Of Action In Their Challenge To The Constitutionality Of The Congressional Franking Privilege.	12
III.	The Ruling Below Wrongly Shut The Courthouse Doors On A Congressional Candidate And Nonwealthy Voters In Their Constitutional Challenge To The Exclusionary Campaign Finance System In Congressional Elections. ..	14
Conclusion		21

TABLE OF CITATIONS

Cases Cited:

Baker v. Carr, 369 U.S. 186 (1962) 16, 19

Brown v. Board of Education, 347 U.S. 483 (1954) 19

Buckey v. Valeo, 424 U.S. 1 (1976) 7, 20

Bullock v. Carter, 405 U.S. 134 (1972) 16

Contents

Page

Coalition To End The Permanent Congress v. Runyon, 979 F.2d 219 (D.C. Cir. 1992) 6, 10

Common Cause v. Bolger, 574 F. Supp. 672 (D.D.C. 1982), *aff'd*, 461 U.S. 911 (1983) ..... i, 6, 8, 9, 10, 11, 12, 13, 14

Davis v. Bandemer, 478 U.S. 109 (1986) 16

Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982) ... 19

Flagg Brothers v. Brooks, 436 U.S. 149 (1978) 15

Fulani v. League of Women Voters Education Fund, 882 F.2d 621 (1989) 11

Gray v. Sanders, 372 U.S. 368 (1963) 16, 20

Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) 16

Hoellen v. Anunzio, 468 F.2d 522 (7th Cir. 1972) 10

Morse v. Republican Party of Virginia, 116 S. Ct. 1186 (1996) 14, 16, 17, 18

Nixon v. Condon, 286 U.S. 73 (1932) 18

Norman v. Reed, 502 U.S. 279 (1992) 11

Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida, 508 U.S. 656 (1993) 11, 12

Contents

Page

O'Hair v. White, 675 F.2d 680 (5th Cir. 1982) 19

Reynolds v. Sims, 377 U.S. 533 (1964) 16

Smith v. Allwright, 321 U.S. 649 (1944) 15, 16, 18

Terry v. Adams, 345 U.S. 461 (1953) 8, 14, 15, 16, 17, 18

United States v. Sheffield Bd. of Comm'rs, 435 U.S. 110 (1978) 16

Weber v. Heaney, 995 F.2d 872 (8th Cir. 1993) 5, 18

Weisberg v. Powell, 417 F.2d 388 (7th Cir. 1969) 10

Wesberry v. Sanders, 376 U.S. 1 (1963) 16

Statutes Cited:

2 U.S.C. § 431 *et seq.* 2, 5, 17

2 U.S.C. § 437(a) 3

2 U.S.C. § 453 ..... 5, 18

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 3

39 U.S.C. § 3210 ..... 2, 3, 9

Contents

Page

United States Constitution Cited:

Article I, Section 2, Clause 1 1

Article III, Section 2, Clause 1 ..... 1, 9

First Amendment 2, 9, 12, 20

Fifth Amendment 2

Fourteenth Amendment 2

Other Authorities Cited:

11 C.F.R. § 108.7(a) 5, 18

11 C.F.R. § 108.7(b) 5, 18

S. Rep. No. 689, 93d Cong., 2d Sess. 1 (1974) 18

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Second Circuit Decided March 12, 1996 ..... 1a

Appendix B — Memorandum and Order of the United States District Court for the Eastern District of New York Dated April 17, 1995 ..... 9a

Appendix C — Relevant Statutes 34a

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 78 F. 3d 66 (2d Cir. 1996), and is reprinted in the Appendix ("App.") to this petition at 1a-8a. The opinion of the District Court for the Eastern District of New York is reported at 884 F. Supp. 685 (E.D.N.Y. 1995), and is reprinted at App. 9a-33a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on March 12, 1996. *See* App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 2, Clause 1 of the United States Constitution provides in pertinent part:

> The House of Representatives shall be composed of Members chosen . . . by the People of the several States. . . .

Article III, Section 2, Clause 1 of the Constitution provides in pertinent part:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . to Controversies to which the United States shall be a Party. . . .

The First Amendment to the Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech. . . .

The Equal Protection Clause of the Fourteenth Amendment to the Constitution (as incorporated in the Due Process Clause of the Fifth Amendment) provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.* is included in the Appendix at App. 34a-117a.

The congressional franking statute, 39 U.S.C. § 3210, is included in the Appendix at App. 118a-128a.

STATEMENT OF THE CASE

Sal Albanese, a congressional candidate, and voters in congressional elections brought this action in July 1994 to challenge the constitutionality of the congressional franking privilege. They further challenged the campaign finance system in congressional elections as discriminatory against nonwealthy voters and candidates. Their complaint, filed in the Eastern District of New York, alleged that these systems of financial privileges violated their constitutional rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as incorporated by the Due Process Clause of the Fifth Amendment to the Constitution; Article I of the Constitution; and the First Amendment to the Constitution. The

Respondents are the Federal Election Commission, Susan Molinari, and the Committee to Re-Elect Susan Molinari. The Petitioners sought declaratory relief leading to the protection of their constitutional rights in the election process. Federal jurisdiction of this case was proper pursuant to 28 U.S.C. § 1331 and 2 U.S.C. § 437(a).

A. Factual History

Petitioner Albanese, a member of the New York City Council, ran as the 1992 Democratic nominee for Congress in the 13th Congressional District of New York which covers Staten Island and parts of Brooklyn. All of the voter Petitioners, who include a bus driver, a public school teacher, a police lieutenant, a carpenter, and a substance abuse counselor, supported Petitioner Albanese's candidacy in 1992. Petitioner Albanese and each of the voters lack wealth and access to wealth. They are unable to make or amass large campaign contributions from their relatives, friends, and associates for the candidate of their choice.

Petitioner Albanese's opponent was the incumbent congressional candidate, Respondent Molinari. As an incumbent Member of Congress, Respondent Molinari received and used a politically valuable public subsidy during her 1992 re-election campaign. This subsidy primarily included $166,953 of taxpayer money to send several mass mailings to the voters of the 13th District, a government benefit provided to Respondent Molinari through the congressional franking statute, 39 U.S.C. § 3210. *See* Affidavit of Plaintiffs' Expert Gary Ruskin, R. No. 19 at 5 (Plaintiffs' Exhibits).[1] As a challenger congressional candidate, Petitioner Albanese did not have access to this public subsidy.

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1. The full record in the District Court will be referred to as "R."

Due to his lack of wealth and access to wealth, Petitioner Albanese was unable to compete effectively against Respondent Molinari in the campaign finance process in congressional elections. Mr. Albanese spent thousands of hours meeting the voters of the 13th Congressional District. He campaigned at subway and ferry stops, visited senior centers and community groups, attended community meetings, and canvassed neighborhoods. Hundreds of volunteers worked for his campaign. Despite all of this, Petitioner Albanese could not, in the end, compete against the money of Respondent Molinari's campaign.

Respondent Molinari and Respondent Committee to Re-Elect Susan Molinari (hereinafter "Respondent Committee") relied on large contributions to finance her campaign. Eighty-one percent of the money Respondent Molinari raised in 1992 for her re-election campaign came from individual and political action committee contributions of $200 or more.

Respondent Molinari and Respondent Committee raised and spent a total of $524,112 in order to retain Molinari's seat in Congress in 1992. Petitioner Albanese raised a total of $267,248 in his 1992 electoral campaign for Congress.

As a result of this campaign finance system, Mr. Albanese never had nor raised enough money in his campaign to afford television advertising, newspaper advertising, district-wide mailings, nor advertising on billboards to reach the voters of New York's 13th Congressional District. Respondent Molinari's campaign purchased all such advertising. The campaign staff Mr. Albanese could afford was meager compared to Respondent Molinari's pollsters, fundraisers, media consultants, and two field offices.

The campaign finance system in the 1992 congressional race in New York's 13th Congressional District served as a critical part of the overall election process. The system effectively excluded the Petitioners and all other voters lacking access to wealth. This effective exclusion continues today.

The campaign finance process in congressional elections is sanctioned and controlled by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.* (1994) ("FECA"). FECA occupies the field of campaign finance in congressional elections, superseding and preempting all state laws in this area. 2 U.S.C. § 453; 11 C.F.R. § 108.7(a),(b); *Weber v. Heaney*, 995 F. 2d 872 (8th Cir. 1993).

The injuries Petitioners suffer and continue to suffer are typical of the congressional campaign finance system nationwide. *See* Affidavit of Plaintiffs' Expert Ellen S. Miller, R. No. 19. Further, like the Petitioners here, challenger congressional candidates and their voter-supporters across the country are harmed by their incumbent opponents' exclusionary access to and use of the congressional franking privilege. *See* Ruskin Affidavit, R. No. 19:

> . . . House incumbents spent a total of $51.5 million on the congressional franking privilege between January 1, 1993, and June 30, 1994. By comparison, the Federal Election Commission reports that the 1,041 congressional challengers [ ] raised a total of $40.8 million during that same period. Many incumbents spend more on the unsolicited mass mailings than the average challenger spends on an entire election campaign.

Id. at 3.

B. The Lower Court Decisions

(1) The District Court Ruling

Respondent Federal Election Commission (hereinafter "Respondent FEC") and Respondent Molinari filed motions to dismiss the Petitioners' complaint on the grounds of standing and failure to state a claim upon which relief may be granted.[2] On April 17, 1995, the District Court issued a memorandum and order granting the Respondents' motions to dismiss, and on April 24, 1995, the District Court entered a judgment to that effect.

The Congressional Franking Privilege

The District Court discussed earlier cases in which other courts had found that candidates and voters have standing to challenge the congressional franking statute. *Common Cause v. Bolger,* 574 F. Supp. 672 (D.D.C. 1982), *aff'd,* 461 U.S. 911 (1983); *Coalition To End The Permanent Congress v. Runyon,* 979 F. 2d 219 (D.C. Cir. 1992). The court distinguished those cases as brought by plaintiffs who were actual candidates, contributors, and campaign workers and described Petitioners in this case as "a would-be candidate who chose not to run and his supporters . . ." App. 29a.

The District Court further held that the Petitioners did not have a cause of action in their constitutional challenge to the congressional franking statute because the three-judge court in *Bolger* had already fully adjudicated that challenge. App. 30a.

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2. Respondent Committee to Re-Elect did not file a separate response to the Petitioners' complaint but rather, through its counsel, joined in Respondent Molinari's response prepared by the General Counsel for the U.S. House of Representatives.

The Campaign Finance System in Congressional Elections

The District Court first found that the Petitioners lacked cognizable injuries to have standing to challenge the campaign finance system under FECA. The court stated that, unlike the "actual" candidates and potential contributors in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Petitioners here were "a potential candidate who decided not to run and his would-be supporters." App. 22a. Further, the court held that the Petitioners' harm was "abstract and conjectural." App. 23a.

Second, the District Court ruled that the Petitioners' injuries from the campaign finance regime were not traceable to FECA. Finally, the court held that the Petitioners' requested declaratory relief would not redress their injuries.

In dismissing Petitioners' constitutional claims for failure to state a claim upon which relief may be granted, the District Court reasoned that this Court in *Buckley* had considered and rejected Petitioners' challenge to FECA.

(2) The Second Circuit Ruling

The Petitioners appealed the District Court's ruling to the United States Court of Appeals for the Second Circuit. On March 12, 1996, the Second Circuit issued a *per curiam* opinion affirming the District Court's ruling.

The Second Circuit affirmed without comment on the question of the Petitioners' standing to challenge the congressional franking statute and on the question of whether they have a cause of action to bring that challenge. The appellate court also affirmed without comment on the question of whether Petitioners have a cause of action to bring their equal protection

challenge to the campaign finance system in congressional elections.

On the issue of the Petitioners' standing to challenge the campaign finance system, the Second Circuit found that the Petitioners' injuries were not traceable to FECA and were not redressable by their requested declaratory relief. The appellate court held that this Court's ruling in *Terry v. Adams*, 345 U.S. 461 (1953), invalidating as unconstitutional an all-white association's pre-primary candidate nominating process, was distinguishable from Petitioners' case. It stated that "[u]nlike the plaintiffs in *Terry*, plaintiffs here are not prevented from voting in any election." App. 8a.

REASONS FOR GRANTING THE WRIT

The lower courts in this case shut the courthouse doors on a congressional candidate and his voter-supporters in their constitutional challenge to the congressional franking privilege and to the exclusionary campaign finance system in congressional elections. These decisions directly conflict with the three-judge court in *Common Cause v. Bolger*, 574 F. Supp. 672 (D.D.C. 1982), a ruling affirmed by this Court, 461 U.S. 911 (1983). The *Bolger* court held that candidates and voters had the right to be heard on the merits of their claim that the congressional franking privilege conferred a distinct political advantage to incumbent congressional candidates over their challengers. By denying standing to a congressional candidate and nonwealthy voters to bring their constitutional challenge to the campaign finance system in congressional elections, the lower courts have severely departed from a long history of voting rights cases in which this Court and lower courts have allowed candidates and voters to be heard. If unreviewed, this ruling poses significant ramifications for future voting rights cases and

will be used to bar future challenges to exclusionary election schemes.

The constitutional issues raised in this case go to the core meaning of equal protection in the election process. Nonwealthy candidates and voters in every congressional district in the United States are significantly impacted by the exclusionary nature of the congressional campaign finance system. If this candidate and his voter-supporters do not have standing to raise these constitutional issues, then no one does. If nonwealthy candidates and voters cannot go to court on a constitutional challenge to the financing system for congressional elections campaigns, then they have nowhere to go. Article III of the United States Constitution provides that this congressional candidate and his voter-supporters shall have their day in court.

I. THE RULING BELOW CONFLICTS WITH THE HOLDING IN *COMMON CAUSE V. BOLGER* THAT CONGRESSIONAL CHALLENGER CANDIDATES AND VOTERS HAVE STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE CONGRESSIONAL FRANKING PRIVILEGE.

In *Common Cause v. Bolger,* 574 F. Supp. 672 (D.D.C. 1982), (three-judge court), *aff'd,* 461 U.S. 911 (1983), candidates and voters challenged the congressional franking statute, 39 U.S.C. § 3210, on the grounds that it "provid[ed] an unconstitutional 'subsidy' to incumbent candidates for Congress. . ." *Id.* at 672. The *Bolger* court held that the candidates and voters had standing to bring their equal protection and First Amendment challenge. The court found that "the franking privilege confers a substantial advantage to incumbent Congressional candidates over their challengers. . ."

Id. at 679. The lower courts in this case have directly conflicted with that ruling.[3]

In its opinion, the Second Circuit affirmed without comment on the question of the plaintiffs' standing to bring their constitutional challenge to the congressional franking privilege. The district court's denial of standing centered entirely on its erroneous factual distinction of this case from *Bolger.* The district court stated that while the *Bolger* plaintiffs included "actual candidates for elective office as well as actual contributors and campaign workers for those candidates," the plaintiffs here are "a would-be candidate who chose not to run and his supporters whose possible actions on his behalf were frustrated by his decision not to run." App. 29a.

Petitioner Albanese was an "actual candidate" for Congress in 1992 against Respondent Molinari. The other thirteen Petitioners were "actual" voter-supporters of Petitioner Albanese's candidacy. As such, the Petitioners here, like the

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3. The lower court rulings in this case also conflict with other court holdings in which candidates and voters were able to be heard on the merits of their challenges to specific sections of the congressional franking statute or specific usages of the privilege. *See Coalition to End the Permanent Congress v. Runyon,* 979 F. 2d 219 (D.C. Cir. 1992) (declaring unconstitutional the incumbent practice of sending franked mail to voters residing outside the incumbent's district but residing in a new future district: "[W]e must assume that the subsidy provides an advantage to the recipient equal to its economic value, and no one has suggested that the frank's value per potential voter to a congressional campaign is insignificant." *Id.* at 226); *Hoellen v. Anunzio,* 468 F. 2d 522 (7th Cir. 1972) (upholding a district court injunction ordering Congressman Frank Anunzio to stop using his franking privilege to send mass mailings to voters living outside his district who had been brought inside a newly configured district in which he would soon be running; the court stated that the franking statute cannot lawfully be applied "to favor one of two opposing candidates entitled to equal treatment under the law." *Id.* at 526 (citing *Weisberg v. Powell,* 417 F. 2d 388 (7th Cir. 1969)).

plaintiffs in *Bolger,* suffered concrete and particularized harms resulting from the use of the congressional franking privilege. Petitioner Albanese need not constantly run for Congress in order to maintain his standing status to challenge the congressional franking statute. *See Fulani v. League of Women Voters Education Fund,* 882 F. 2d 621, 628 (1989) (rejecting as "wholly without merit" argument that former presidential candidate's claims were "moot" because election was over); *see also Norman v. Reed,* 502 U.S. 279, 288 (1992) (further application of the "capable of repetition, yet evading review" doctrine in the election context).

Further, Petitioner Albanese need not prove that he would have won election had he been afforded access to the incumbent subsidy to send mass mailings to the voters of New York's 13th Congressional District. Petitioner Albanese and his voter-supporters have standing to challenge this denial of equal treatment, irrespective of the election outcome. As this Court has held:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida, 508 U.S.

656, 666 (1993) (holding that members of construction contractors' association have standing to challenge minority set-aside program without showing actual loss of contract since "the 'injury in fact' is the inability to compete on an equal footing in the bidding process. . ." *Id.* at 666).

The Petitioners here have the right to be heard on the merits of their constitutional challenge to the congressional franking privilege. The clear conflict between the rulings below and the *Bolger* decision should be addressed and resolved by this Court.

II. THE RULING BELOW CONFLICTS WITH THE HOLDING IN *BOLGER* THAT CONGRESSIONAL CHALLENGER CANDIDATES AND VOTERS HAD STATED A CAUSE OF ACTION IN THEIR CHALLENGE TO THE CONSTITUTIONALITY OF THE CONGRESSIONAL FRANKING PRIVILEGE.

The *Bolger* court held that the plaintiffs had stated a cause of action in their equal protection and First Amendment challenge to the congressional franking statute. The rulings below directly conflict with the *Bolger* decision.

The Second Circuit affirmed without comment on the question of whether the Petitioners had stated a cause of action in their constitutional challenge to the congressional franking statute. The district court's holding that the Petitioners' claims had been "previously fully adjudicated" in the *Bolger* case is wrong. App. 30a.

The *Bolger* court opened the door for Petitioners' claims here. The three-judge court specifically invited more richly developed records and more carefully drawn demands for relief — such as Petitioners have brought foward in this case. While finding that "the franking privilege confers a substantial

advantage to incumbent Congressional candidates over their challengers," the court stated that there was a "lack of evidence" presented in the case as to how decisive such an advantage was to the electoral success of incumbents. *Bolger,* 574 F. Supp. at 679. In addition, the plaintiffs in *Bolger* had requested the abolition of the franking privilege rather than the far more sensible relief that "non-incumbents should also be afforded the franking privilege," *id.* at 682, as the Petitioners here have requested. The court thus issued the following invitation for further litigation:

> Were the frank shown to be available and widely used for reelection purposes and had plaintiffs demonstrated that such use has a substantial detrimental impact on opposing candidates or members of the voting public seeking to educate themselves on the candidates and the issues, plaintiffs' claims, particularly those based on the First Amendment, would have considerable merit.

Id. at 682.

The congressional franking statute provides a substantial public subsidy to only one class of congressional candidates: incumbent Members of Congress. Between January 1991 and September 22, 1992, House incumbents spent a total of $74.9 million on government-financed franked mail. The House incumbents' use of the congressional franking privilege in the first eight months of 1992, an election year, increased by 40 percent compared to the same period in 1991. *See* Ruskin Affidavit, R. No. 19 at 5. Challenger candidates and their voter-supporters in congressional districts across the country must face this distinct disadvantage every election cycle. The Petitioners' challenge to the congressional franking privilege

thus implicates the constitutional rights of challenger candidates and voters throughout the nation, and it raises fundamental questions about the fairness of the congressional election process.

Like the plaintiffs in *Bolger*, the Petitioners here have stated a claim upon which relief may be granted. Further, the Petitioners have followed the *Bolger* court's specific invitation for a new challenge to the congressional franking statute. The clear conflict between the rulings below and the *Bolger* decision should be addressed and resolved by this Court.

III. THE RULING BELOW WRONGLY SHUT THE COURTHOUSE DOORS ON A CONGRESSIONAL CANDIDATE AND NONWEALTHY VOTERS IN THEIR CONSTITUTIONAL CHALLENGE TO THE EXCLUSIONARY CAMPAIGN FINANCE SYSTEM IN CONGRESSIONAL ELECTIONS.

The Petitioners here have brought a constitutional challenge to the exclusionary campaign finance system in congressional elections. The system they challenge, which they call "the wealth primary," exists in every congressional district in the country. It has become "an integral part . . . of the elective process that determines who shall rule and govern. . ." *Terry v. Adams*, 345 U.S. 461, 469 (1953) (invalidating an all-white association's pre-primary candidate nominating process as an unconstitutional infringement on the right to vote of African-American citizens). As this Court has again recognized this term, exclusion from "an integral part" of the election process, "does not merely curtail [Petitioners'] voting power, but abridges their right to vote itself." *Morse v. Republican Party of Virginia*, 116 S. Ct. 1186, 1200 (1996).

Eighty-nine percent of all winning candidates for the U.S. House of Representatives first win the wealth primary, then win election. The average cost today for winning a seat in the U.S. House of Representatives is $543,000. Wealthy interests dominate the campaign finance system. More than 80% of all money flowing to congressional campaigns comes from large contributors in amounts of $200 or more. Most voters cannot afford to participate in the process of amassing large sums of wealth for congressional campaigns. Out of a country of 250 million people, fewer than 900,000 gave direct individual contributions to candidates of $200 or more in 1992. Like the modest-income voter plaintiffs here, the vast majority of citizens are unable to be heard in the wealth primary because of their lack of wealth. They are effectively excluded from this critical process. *See* Miller Affidavit, R. No. 19 at 4-10.

The wealth primary process in congressional elections today threatens the basic tenets of democracy and the constitutional rights of all nonwealthy candidates and voters. As a congressional candidate and as nonwealthy voters, the Petitioners have the right to be heard on the merits of their claims. By closing the courthouse doors on the Petitioners' challenge, the Second Circuit has severely departed from a long history of voting rights cases in which candidates and voters have had their day in court to challenge exclusionary election schemes.

This Court has long recognized that the public election process in the United States "is an exclusively public function." *Flagg Brothers v. Brooks*, 436 U.S. 149, 158 (1978) As such, "any 'part of the machinery for choosing officials' becomes subject to the Constitution's restraints," even if that machinery is a private association taking "the form of 'voluntary association' of unofficial character." *Terry v. Adams*, 345 U.S. at 481 (1953) (Justice Clark, concurring), quoting *Smith v.*

Allwright, 321 U.S. 649, 664 (1944). This Court reiterated this principle in *Morse*, holding that Section 5 of the Voting Rights Act of 1965, " '*like the constitutional provisions it is designed to implement*, applies to all entities having any power over any aspect of the electoral process. . .' " *Morse*, 116 S. Ct. at 1206, quoting *United States v. Sheffield Bd. of Comm'rs*, 435 U.S. 110, 118 (1978) (emphasis added). Petitioners have demonstrated in the record below that the wealth primary today, like the white primary of the past, has become "part of the machinery" for choosing Representatives for the United States Congress.

As non-wealthy voters and as a congressional candidate, Petitioners have documented the concrete and particularized harms they suffer by their effective exclusion from an integral part of the congressional election process. Like the plaintiffs in *Morse* and *Terry*, the plaintiffs here suffer cognizable injuries. The exclusionary campaign finance system in congressional elections disadvantages the Petitioner-voters "in their opportunity to influence the political process effectively." *Davis v. Bandemer*, 478 U.S. 109, 133 (1986). It undermines and debases the constitutionally guaranteed value of Petitioners' votes. *See Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1963); *Gray v. Sanders*, 372 U.S. 368 (1963); *Reynolds v. Sims*, 377 U.S. 533 (1964) (finding that the dilution and debasement of the right to vote is as unconstitutional as the absolute prohibition of the franchise). It presents a "real and appreciable impact on the exercise of the franchise." *Bullock v. Carter*, 405 U.S. 134, 144 (1972) (striking down as unconstitutional under the Equal Protection Clause a system of high candidate filing fees: "[W]e would ignore reality were we not to find that this system falls with unequal weight on voters, as well as candidates, according to their economic status." *Id.*). *See also Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) (striking down as unconstitutional under the Equal Protection Clause a $1.50 poll tax in Virginia state elections.)

Like the filing fee in *Morse*, the exclusionary campaign finance system "undercuts [Petitioners'] influence on the field of candidates whose names will appear on the ballot, and thus weakens the 'effectiveness' of their votes. . ." *Morse*, 116 S. Ct. at 1199.

As non-wealthy voters, all of the Petitioners continue to be effectively excluded from the wealth primary process in congressional elections today, and they, therefore, continue to suffer cognizable injuries. Petitioners' injuries are not tied solely to their support of Petitioner Albanese's 1992 congressional candidacy. They suffer harm as individual voters effectively excluded from the wealth primary process in congressional elections, a process which repeats itself every election cycle.

The Second Circuit erroneously distinguished the Petitioners here from the plaintiffs in *Terry* by stating that "[u]nlike the plaintiffs in *Terry*, plaintiffs here are not prevented from voting in any election." App. 8a. This distinction is wrong. The plaintiffs in *Terry* were not prevented from voting in an election. Rather, they were excluded from participating in an all-white association's pre-primary candidate nominating process, a process which had become "an integral part" of the overall election process.

Under the Second Circuit's standard in this case — in which plaintiff-voters must be actually barred from voting in an election to have standing to challenge an exclusionary election scheme — *Terry* and the long line of voting rights cases since *Terry* would never have been heard on their merits.

In holding that the Petitioners' injuries were not "fairly traceable" to the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.* (1994) ("FECA"), the Second Circuit misapplied this Court's holding in *Terry*. *Terry*, like this Court's

two prior white primary cases, *Smith v. Allwright*, 321 U.S. 649 (1944) and *Nixon v. Condon*, 286 U.S. 73 (1932), did not involve any state or federal statute. In each of those cases, the defendants, in fact, argued, as the Respondent Federal Election Commission has argued here, that the actions challenged were merely "the actions of private parties." Federal Election Commission Appellate Brief to the Second Circuit at 24.

As this Court re-affirmed in *Morse:* "Although the Jaybirds had no official status, received no state funds, and conducted a purely private election, the Court readily concluded that this voluntary association's exclusion of black voters from its primaries on racial grounds was prohibited by the Fifteenth Amendment." *Morse*, 116 S. Ct. at 1202, citing *Terry*. The critical issue for this Court in *Terry* was that the all-white association's candidate nominating process had become "an integral part" of the overall election process and "that somewhere, somehow, to some extent, there [was] an infusion of conduct of officials, panoplied with State power. . ." *Terry*, 345 U.S. at 469, 473 (Justice Frankfurter, concurring).

Petitioners have demonstrated that the wealth primary process is infused with conduct by public officials, including Respondent Molinari, and by a federal agency, Respondent FEC. Respondent FEC authorizes and exercises "complete control over" the campaign finance system in congressional elections. S. Rep. No. 689, 93d Cong., 2d Sess. 1 (1974). FECA occupies the field of campaign finance in the congressional election process, superseding and preempting all state laws in this area. 2 U.S.C. § 453; 11 C.F.R. § 108.7(a),(b); *Weber v. Heaney*, 995 F. 2d 872 (8th Cir. 1993). As a Member of Congress, Respondent Molinari receives and uses a public subsidy, primarily through the congressional franking privilege, to support her re-election campaigns. Respondent Molinari and Respondent Committee to Re-Elect Susan Molinari actively participate in the wealth

primary process, soliciting, accepting, and spending the large sums of wealth raised through that process. The Petitioners' injuries are traceable to the Respondents' actions in the exclusionary campaign finance system in congressional elections, a system sanctioned and controlled by FECA.

Petitioners' prayer for relief is a request for a declaratory judgment invalidating the wealth primary process on constitutional grounds and a declaratory judgment that FECA, insofar as it allows for the solicitation and use of private money in federal elections, is unconstitutional. Such declaratory relief would initiate the process of protecting Petitioners' constitutional rights in a manner consistent with the judiciary's prior use of its declaratory power to provide such protection. *See Baker v. Carr,* 369 U.S. 186 (1962) and its progeny (declaratory power used to strike down malapportioned districts) and *Brown v. Board of Education,* 347 U.S. 483 (1954) and its progeny (declaratory power used to bar racial segregation in public schools and facilities).

The Second Circuit misread the Petitioners' requested declaratory relief as resulting in the elimination of FECA's current limits on campaign contributions. Petitioners' requested relief does not refer anywhere to contribution limitations.

The question here is the voters' standing — not the merits of their claim. In *Dopico v. Goldschmidt,* 687 F. 2d 644 (2d Cir. 1982), the Second Circuit reversed a district court's dismissal of plaintiffs' claims based on the massive relief which plaintiffs requested. The appellate court found that such a dismissal would require a conclusion that plaintiffs were not entitled to any relief, a conclusion which, it held, would be improper in the early stage of the case. *See also O'Hair v. White,* 675 F. 2d 680, 689 (5th Cir. 1982): "When a complaint alleges injury stemming from a clogged democratic process, it would be anomalous to require

the plaintiff to seek relief from political institutions. O'Hair, 'like any person whose right to vote is impaired has standing to sue.' " (quoting *Gray v. Sanders*, 372 U.S. at 375). The Petitioners have the right to be heard on the merits of their claims.

The Second Circuit affirmed without comment on the question of whether the Petitioners had stated a cause of action in their challenge to the exclusionary campaign finance system in congressional elections. The district court reasoned that since this Court had already held FECA to be constitutional in *Buckey v. Valeo*, 424 U.S. 1 (1976), the Petitioners' action should be dismissed. The *Buckley* plaintiffs included a well-financed candidate and wealthy contributors who challenged FECA's contribution and expenditure limitations on First Amendment grounds. The Petitioners here include a nonwealthy candidate and nonwealthy voters who have brought a different case, challenging on equal protection grounds the exclusionary campaign finance system sanctioned and controlled by FECA. In *Buckley*, this Court did not hear Petitioners' claims and did not address them.

If *Buckley* is relevant at all, it is in this way: The *Buckley* plaintiffs had their day in court. They were able to reach the merits of their claims. If the courthouse doors are open to the *Buckley* plaintiffs, they must be open to Sal Albanese and voters in congressional elections. The ruling below contravenes a long history of voting rights cases in which the courthouse doors have stayed open. It should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED MARCH 12, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 667—August Term, 1995

(Argued: December 21, 1995 Decided: March 12, 1996)

Docket No. 95-6099

SAL F. ALBANESE, TIM CARL, LORETTA CARL, JOSEPH CAROLEI, JOHN CASTELLI, STEPHEN CLINTON, GREGORY GLOVER, TINAMARIE LAMBIASI, JOHN O'DONNELL, ELAINE POLENINI, ROCHELLE PUGLISI, TOBIAS RUSSO, TERRY SILVEIRA and VICTOR M. SUAREZ,

Plaintiffs-Appellants,

–v.–

FEDERAL ELECTION COMMISSION, SUSAN MOLINARI, COMMITTEE TO RE-ELECT SUSAN MOLINARI,

Defendants-Appellees.

Before:

KEARSE, MAHONEY, and PARKER,

Circuit Judges.

Appendix A

Appeal from a judgment of the United States District Court for the Eastern District of New York, I. Leo Glasser, *Judge*, dismissing complaint challenging Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.*, and congressional mail franking statute, 39 U.S.C. § 3210. *See* 884 F. Supp. 685 (1995).

Affirmed.

JOHN C. BONIFAZ, Boston, Massachusetts (Cristobal Bonifaz, Jason Adkins, Jordan Yeager, Boston, Massachusetts, John W. Carroll, Wolfson & Carroll, New York, New York, Abigail Turner, National Voting Rights Institute, Boston, Massachusetts, on the brief), *for Plaintiffs-Appellants.*

KERRY W. KIRCHER, Washington, D.C. (Cheryl A. Lau, General Counsel, Geraldine R. Gennet, Deputy General Counsel, Michael L. Murray, Senior Assistant Counsel, Barbara K. Bracher, Office of General Counsel, U.S. House of Representatives, Washington, D.C., on the brief), *for Defendant-Appellee Susan Molinari.*

LAWRENCE M. NOBLE, General Counsel, Federal Election Commission, Washington, D.C. (Richard B. Bader, Associate General Counsel, Vivien Clair, Federal Election Commission, Washington, D.C., of counsel), *submitted a brief for Defendant-Appellee Federal Election Commission.*

CAWSE & BIRMINGHAM Staten Island, New York (Richard F. Birmingham, Staten Island, New York, of counsel), *for Defendant-Appellee Committee to Re-Elect Susan Molinari,* joined the briefs of the other defendants-appellees.

Appendix A

Per Curiam:

Plaintiffs Sal F. Albanese *et al.* appeal from a judgment of the United States District Court for the Eastern District of New York, I. Leo Glasser, *Judge*, dismissing their complaint seeking a Judgment declaring, *inter alia*, that their rights under the Equal Protection Clause of the Fourteenth Amendment, as incorporated into the Due Process Clause of the Fifth Amendment, are violated by (a) the solicitation and use of private funds in elections for federal office, as permitted by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.* (1994) ("FECA"), and (b) the use by incumbent federal candidates of franking privileges, as permitted by 39 U.S.C. § 3210 (1994). The district court dismissed the complaint principally for lack of standing, failure to state a claim on which relief can be granted, and presentation of nonjusticiable political questions. On appeal, plaintiffs challenge these rulings. Finding no error, we affirm.

I. BACKGROUND

The present action was brought to challenge the system by which federal congressional elections are financed. Plaintiffs contend that the present system favors (a) candidates backed by wealthy supporters and (b) incumbent candidates who have mail franking and other privileges. The facts underlying the action, which according to the district court are not in dispute, are set forth in greater detail in the district court's opinion, reported at 884 F. Supp. 685 (1995), familiarity with which is assumed.

Defendant Susan Molinari ("Rep. Molinari") has represented the 13th Congressional District of the State of New York in the United States House of Representatives since 1990.

Appendix A

Albanese is a New York City councilman who was the Democratic Party's congressional candidate in the 13th District in 1992; he lost that election to Rep. Molinari. Albanese decided not to run for Congress in 1994 because he believed his inability to raise funds would prevent his meaningful participation in the electoral process. Plaintiff Tim Carl considered running for Congress as an independent candidate in the 13th District in 1992 but chose not to do so because he believed he could not raise sufficient funds to conduct an effective campaign. The other plaintiffs are registered voters residing in the 13th District who supported Albanese in the 1992 election.

Through defendant Committee to Re-Elect Susan Molinari, Rep. Molinari raised approximately twice as much money for her 1992 campaign as Albanese did for his. Plaintiffs contended that Rep. Molinari could therefore afford certain campaign tools, such as television advertisements and district-wide mailings, that Albanese could not. In addition, consistent with the applicable statutes and rules, Rep. Molinari used franked mail and her office staff in ways that plaintiffs contended enhanced her campaign.

Plaintiffs did not allege any violation of either FECA or the franking statute. Rather, they contended that the present system for the conduct of campaigns for federal primary elections, which they dub "wealth primaries," as well as for federal general elections, violates the constitutional rights of (a) candidates such as Albanese, and would-be candidates such as Carl, who are not incumbents and who lack personal wealth or sufficient affluent backers, and (b) voters who support, or would support, such candidates. Plaintiffs challenged the constitutionality of FECA in that it, *inter alia,* permits the solicitation and use of private moneys to finance election campaigns, and of 39 U.S.C. § 3210

in that it, *inter alia,* permits incumbent candidates to use franked mail in ways that enhance their campaigns. They sought a declaratory judgment principally holding the challenged statutes unconstitutional, forbidding the use of private moneys in federal elections, and forbidding the furnishing of politically valuable public subsidies, such as franking, to incumbent candidates unless those subsidies are made equally available to all other candidates.

Defendants moved to dismiss the complaint for lack of subject matter jurisdiction, failure to state a claim on which relief can be granted, and lack of standing. The district court granted the motions to dismiss, holding, *inter alia,* that plaintiffs lack standing to challenge FECA, *see* 884 F. Supp. at 693; that FECA is constitutional, *see id.*; that the franking statute is constitutional, *see id.* at 695; and that the political question doctrine precludes consideration of plaintiffs' challenges to other privileges enjoyed by incumbents, *see id.* at 693-94. This appeal followed.

II. DISCUSSION

A. *Challenges to FECA*

Plaintiffs contend that the district court erred in ruling that they lack standing to challenge the campaign finance system authorized under FECA, arguing, *inter alia,* that they suffered injury as candidates, would-be candidates, and voters who were excluded from an integral part of the electoral process because they did not have the large sums of money needed to influence the congressional campaign funding process. We conclude that they lack standing to challenge the validity of FECA substantially for the reasons stated in the district court's opinion, *see* 884 F. Supp. at 688-93.

Appendix A

In order to have standing under Article III of the Constitution, a plaintiff must seek redress for an injury that is both "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984); *see also Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 45-46 (1976); *Whitmore v. Federal Election Commission*, 68 F.3d 1212, 1215 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3519 (U.S. Jan. 23, 1996) (No. 95-1195). Plaintiffs have not met these standards.

First, the injury they assert is not "fairly traceable" to FECA. FECA does not require that contributions be made to any candidate. Rather, it limits the amounts of contributions that may be made. *See* 2 U.S.C. § 441a. Hence, any injury claimed by these plaintiffs is not attributable to FECA.

Second, plaintiffs have not shown that their claimed injuries are "likely to be redressed by" a declaration that FECA is unconstitutional. Indeed, since FECA limits the amounts of contributions that are permissible, the elimination of those ceilings could well place candidates whose constituencies do not include a plethora of wealthy supporters at an even greater disadvantage. And though FECA by its terms preempts state law "with respect to election to Federal office," 2 U.S.C. § 453; *see also Weber v. Heaney*, 995 F.2d 872, 873, 875 (8th Cir. 1993) (FECA preempts state statute establishing system for federal congressional candidates to agree to limit campaign spending in order to receive state funding), and plaintiffs argue that if the court were to invalidate FECA, individual states would be allowed to pass statutes that would require equal financial support for all legitimate congressional candidates, the complaint provides no basis for inferring any substantial

likelihood that the State of New York would pass such legislation.

We note that although FECA provides that questions concerning its constitutionality shall be immediately certified to the Court of Appeals for the appropriate circuit, sitting en banc, *see* 2 U.S.C. § 437h, the district court properly declined to issue such certification in this case because plaintiffs lack standing to bring the challenges to FECA, *see California Medical Association v. Federal Election Commission*, 453 U.S. 182, 193 n.14 (1981); *Whitmore v. Federal Election Commission*, 68 F.3d at 1214.

B. *Other Claims*

Plaintiffs' other claims include the assertion that the present campaign financing system excludes them from an integral part of the electoral process, thereby depriving them of their equal protection rights as nonwealthy voters; of their First Amendment rights to have their voices heard by having their campaign activities and contributions be effective; and of their Article I rights to have the members of the House of Representatives be "chosen . . . by the People." U.S. Const. art. I, § 2. We conclude that these claims were properly dismissed substantially for the reasons stated in the district court's opinion, *see* 884 F. Supp. at 692-93.

Plaintiffs' reliance on cases such as *Terry v. Adams*, 345 U.S. 461 (1953), which invalidated racially exclusionary primary election devices, is unpersuasive. Terry, for example, held that the Jaybird Democratic Association's pre-primary endorsement process, which was limited to white voters, unconstitutionally infringed upon the right of African-American citizens to vote.

See id. at 469-70. Unlike the plaintiffs in *Terry*, plaintiffs here are not prevented from voting in any election.

CONCLUSION

We have considered all of plaintiffs' arguments on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED APRIL 17, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-94-3299

SAL F. ALBANESE, et al.,

Plaintiffs,

-against-

THE FEDERAL ELECTION COMMISSION, HON. SUSAN MOLINARI, COMMITTEE TO RE-ELECT SUSAN MOLINARI,

Defendants.

MEMORANDUM AND ORDER

GLASSER, United States District Judge:

BACKGROUND

Plaintiffs' Claims and Relief Sought

Plaintiffs have brought this action to challenge the constitutionality of various aspects of the current system through which congressional elections are financed. They denote the system they challenge the "wealth primary," and base their case upon the Equal Protection Clause of the Fourteenth Amendment, the First Amendment, and Article I, Section 2 of the United States

Constitution.[1] Specifically, plaintiffs' challenge the existing laws which structure the way in which public and private funds are accumulated and used by incumbent members of the House of Representatives in seeking re-election. They define the "wealth primary" as:

> "the exclusionary campaign finance process in federal elections which heavily favors incumbents, wealthy candidates, and candidates backed by affluent supporters and monied interests and which, simultaneously, prevents potential office seekers lacking personal wealth or affluent backers from competing effectively for political office."

Complaint ¶2. In this action, plaintiffs have explicitly challenged the constitutionality of the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.* ("FECA"), and the authorization of funds for the congressional franking of mail, 39 U.S.C. § 3210. They seek the following declaratory relief: (1) the invalidation of the wealth primary in the 13th Congressional District for the State of New York; (2) the invalidation of the FECA insofar as it allows for the use of private monies in federal elections; (3) the invalidation of the franking statute unless and until equal funds are appropriated for qualified challengers to incumbent federal office holders; and (4) that members of the United States Congress be declared to be acting as private citizens when engaged in activity as a candidate, and that the government may not provide that member with a subsidy that is not shared equally by other candidates for that office.

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1. Plaintiffs cite the following language from that section: "The House of Representatives shall be composed of Members chosen . . . by the People of the several States."

Appendix B

Parties to the Action

All of the plaintiffs are registered voters residing in the 13th Congressional District of the State of New York. Plaintiff Albanese, a New York City Councilman, was the 1992 Democratic Party congressional candidate for the 13th District. He lost that election to Defendant Molinari who continues to represent the 13th District in the House of Representatives. Plaintiff Carl considered running for congress from the 13th District as an independent candidate in 1992, but chose not to because he did not believe he could raise the funds necessary to run effectively. The various other plaintiffs in this action are individuals who voted for Plaintiff Albanese in the 1992 election, some of whom worked on his campaign as volunteers.

As mentioned above, Defendant Molinari is the current Representative for the 13th District, re-elected for her third term in 1994. Defendant Committee To Re-Elect Susan Molinari (the "Committee") is the entity through which money was raised and spent for Rep. Molinari's campaigns. Defendant Federal Election Commission ("FEC") is the agency established by the FECA to interpret and enforce the provisions of that statute.

Facts

The facts underlying this action are uncontested by the parties. As previously mentioned, Plaintiff Albanese was the 1992 Democratic congressional candidate for the 13th District. In the course of that campaign, he raised $267,248 in support of his candidacy from political action committees and individuals. Rep. Molinari, the victorious Republican candidate, and the Committee raised $524,112 in support of her re-election from groups and individuals. Rep. Molinari utilized various campaign

tools, such as television advertisements and district wide mailings, that her challenger claims he could not afford. Defendants concede that Rep. Molinari, as an incumbent, lawfully utilized franked mail and her office staff, in manners consistent with their respective restrictions. In the election, Ms. Molinari received 55% of the vote to 39% for Plaintiff Albanese. There is no claim that this election did not comply with the FECA and other campaign laws, or that the FEC did not discharge its responsibilities in that regard.

In the 1994 election cycle, Plaintiff Albanese chose not to challenge Rep. Molinari again because he believed he could not raise the funds necessary to mount an effective campaign. The other plaintiffs in this action wished to support Plaintiff Albanese's candidacy but could not do so in 1994 due to his decision not to run for office.

The defendants have brought these motions to dismiss the complaint with respect to the claims raised against each of them, respectively.[2] Each defendant contends that plaintiffs' complaint should be dismissed pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction, asserting that plaintiffs lack standing to maintain this action, and Fed.R.Civ.P. 12(b)(6) that the complaint fails to state a claim upon which relief can be granted.

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2. FEC has addressed the challenge to FECA in its motion to dismiss, while Rep. Molinari, through the House of Representatives Office of the General Counsel, has addressed the challenge to the franking statute and other Member privileges. The Committee to Re-Elect has joined in the papers submitted by the House of Representatives Office of the General Counsel.

Appendix B

DISCUSSION

Standards Under Rule 12(b)

At the outset it is important to note the standards for determining these motions. When deciding a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court must take all allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Ortiz v. Cornetta*, 867 F.2d 146, 149 (2d Cir. 1989). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Easton v. Sundram*, 947 F.2d 1011, 1014-15 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1943 (1992).

However, with regard to a motion pursuant to Rule 12(b)(1), which questions the jurisdiction of a court to entertain the action, the standard may be different. As one court aptly noted recently:

> Rule 12(b)(1) motions to dismiss based upon [lack of] subject matter jurisdiction generally come in two varieties. A *facial* attack . . . merely questions the sufficiency of the pleading. In reviewing such a facial attack, a trial court takes the allegations in the complaint as true, which is a similar safeguard employed under 12(b)(6) motions to dismiss. On the other hand, when a court reviews a complaint under a *factual* attack . . . no presumptive truthfulness applies to the factual allegations . . . When facts presented to the district court give rise to a

> factual controversy, the district court must . . . arrive at the factual predicate that subject matter jurisdiction exists or does not exist.

Ohio Nat. Life Ins. Co. v. U.S., 922 F.2d 320 (6th Cir. 1990); *see* also Wright & Miller, 5A *Federal Practice and Procedure* §§ 1350, 1364; *United Transp. Unions 385 & 77 v. Metro North Commuter*, 862 F.Supp. 55, 57 (S.D.N.Y. 1994). This discussion will first address defendants motions pursuant to Rule 12(b)(1) and then turn to their claims under Rule 12(b)(6) in the context of each aspect of plaintiffs' action.

The Requirement for Standing — Generally

"Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.' As the [Supreme] Court explained in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471-476 (1982), the 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers upon which the Federal Government is founded." *Allen v. Wright*, 468 U.S. 737, 750 (1983). The Court in *Allen* adopted Judge Bork's concurring opinion in *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178 (D.C. Cir.), *cert. den.* 464 U.S. 823 (1983), as follows:

> All of the doctrines that cluster about Article III — not only standing but mootness, ripeness, political question, and the like — relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and

> prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.

468 U.S. at 750. After observing that the "case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government" and that "standing" is perhaps the most important of these doctrines, the Court wrote:

> The Art. III doctrine that requires a litigant to have "standing" to invoke the power of a federal court is perhaps the most important of these doctrines. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." . . . Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction . . . such as . . . the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked . . . The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendants allegedly unlawful conduct and likely to be redressed by the requested relief. . . .
>
> Like the prudential component, the constitutional component of standing

doctrine incorporates concepts concededly not susceptible of precise definition. The injury alleged must be . . . " distinct and palpable" . . . and not "abstract" or "conjectural" or "hypothetical" . . . The injury must be "fairly" traceable to the challenged action, and relief from the injury must be "likely" to follow from a favorable decision . . . These terms cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise.

. . . Typically . . . the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative? These questions and any others relevant to the standing inquiry must be answered by reference to the Art. III notion that federal courts may exercise power only "in the last resort, and as a necessity". . . and only when adjudication is "consistent with system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process". . . .

Allen, 468 U.S. at 751-752 (citations omitted); *see also*, Wright & Miller 13 *Fed. Prac. & Procedure* § 3531.[3]

Before turning to the parties' contentions and the case law addressing this traditional standing analysis, this Court must address an aspect of standing analysis unique to a case brought to challenge the FECA. Section 437h(a) of that Act provides:

> The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

At first blush, this section seems to grant standing to the three enumerated classes to challenge the constitutionality of FECA provisions. However, the Supreme Court has consistently held that this section is bounded by the limits of Article III standing requirements. "Congress may not," the Court stated, "require [a federal court] to render opinions in matters which are

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3. This Court is also obliged to determine whether plaintiffs have standing to maintain this action since they seek declaratory relief which may be rendered by this Court only "in a case of actual controversy within its jurisdiction." 28 U.S.C. § 2201 *et seq.*; *see Stronko v. Bergin*, 843 F.Supp. 827 (N.D.N.Y. 1994).

not 'cases or controversies'. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937) . . . It is clear that Congress, in enacting [section] 437h, intended to provide judicial review to the extent permitted by Article III." *Buckley v. Valeo*, 424 U.S. 1, 11-12 (1975); *see also California Medical Assn. v. FEC*, 453 U.S. 182, fn.6, fn.14.[4] Thus, this discussion must return to the traditional standing analysis. For the sake of clarity, I will first address the issue of standing to challenge the FECA and campaign contributions and then turn to plaintiffs' standing to challenge the franking statute and other activities of the incumbent Representative.

Standing to Challenge the FECA

It is important to note that what the FECA seeks to accomplish is to "limit the actuality and appearance of corruption resulting from large individual financial contributions" to political candidates. *Buckley*, 424 U.S. at 26. The Act attempts to achieve this goal by limiting the amount of money any individual or PAC[5] can contribute to a candidate or her campaign committee, 2 U.S.C. § 441, and by mandating reporting requirements for receipts and disbursements of political committees, § 434.

Past challenges to the FECA have been principally based upon the First Amendment on the ground that limitations upon

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4. In *Bread Political Action Committee v. FEC*, 455 U.S. 577 (1981), the Court read § 437h as a *restriction* upon who was eligible to challenge FECA provisions, holding only the enumerated classes and not PACs nor trade associations may sue under this section.

5. The contributions of other entities may be limited as well. *See* FECA § 441b; *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

political contributions are an impermissible restriction of free speech. Such challenges have been directly rejected by Buckley and its progeny. Plaintiffs in this action challenge the FECA principally on the basis of the Equal Protection clause.[6] They invoke the line of cases that have ensured equal access to the voting process and the principle of one person/one vote — *e.g. Nixon v. Herndon*, 273 U.S. 536 (1927); *Terry v. Adams*, 345 U.S. 461 (1953); *Baker v. Carr*, 369 U.S. 186 (1962); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Bullock v. Carter*, 405 U.S. 134 (1972). In each of these cases, the plaintiffs were granted standing to seek redress of the injury to their franchise and, relying upon those cases, plaintiffs seek standing to do so here.

Defendant FEC contends that the plaintiffs fail to meet the three part standing test which requires plaintiffs to identify (1) an actual injury that is (2) caused by the challenged act and (3) likely to be redressed by the relief requested. More specifically, FEC asserts that Albanese suffered no actual injury in the fact that Albanese was unable to raise more funds in support of his 1992 candidacy nor in the fact that he decided not to run in 1994. Nor is there an actual injury suffered by the plaintiffs who supported Albanese's failed 1992 candidacy and did not have the opportunity to support and vote for him in 1994. FEC further asserts that these alleged injuries cannot be traced to the FECA as their cause. Rather than mandating that contributions be made to any candidate, the statute limits the amounts of contributions that may be made. Thus, plaintiffs' asserted injury is best attributed to Albanese's own decision not to run for office and not the FECA. *See Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130,

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6. Plaintiffs also invoke Article I, Section 2 as interpreted by *Wesberry v. Sanders*, 376 U.S. 1 (1963). This, too, was a malapportionment case and its treatment is consistent with the analysis which follows.

2137 (1992) . Lastly, to grant the declaratory judgment that plaintiffs seek would eliminate the contribution limits established by the Act, would not provide funds for challengers to incumbents and would not prohibit private contributions since the FECA does not authorize them. Thus, contends FEC, the requested relief would not redress the alleged injury.

In response, plaintiffs contend they do meet the three part standing test to challenge the FECA. They claim they have suffered an actual injury. Specifically, they assert that they are excluded from an "integral part of the election process"[7] — the wealth primary — and that this exclusion is by virtue of their economic status and, therefore, prohibited by cases such as *Bullock v. Carter,* 405 U.S. 134 (1972) (declaring an exclusionary ballot registration fee unconstitutional). *See also Lubin v. Panish*, 415 U.S. 709 (1974). In addition, plaintiffs contend that they suffer injury in that their right to vote is "debased" in manners found unconstitutional in *Baker v. Carr,* 369 U.S. 186 (1962) and its progeny which struck down malapportioned voting districts under the Equal Protection clause. They contend that their votes are debased by virtue of a "system" which allows wealthier interests to make contributions to office holders and, thereby, gain increased access to exert their influence with those officials.

Plaintiffs insist their injury is traceable to the FECA and the FEC. They emphasize that the current regime of campaign financing exists by virtue of the FECA and the FEC, its enforcement arm. In support of this position, plaintiffs point to

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7. In support of this position, plaintiffs have submitted the Affidavit and supporting exhibits of Ellen Miller of the Center for Responsive Politics which purports to demonstrate the correlation between success in fund raising and winning congressional elections.

the fact that, as a federal statute, the FECA preempts any state laws that might conflict with its provisions.

Lastly, plaintiffs contend that their injury will be redressed by the relief sought. They contend that they only ask this Court to declare the FECA unconstitutional insofar as it allows for the solicitation and use of private monies in federal elections, and it will then be the responsibility of the United States Congress to react appropriately to the judgment and pass responsive legislation.[8]

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8. A careful consideration of the preceding arguments advanced by plaintiffs and FEC leads to the following conclusion: At the heart of plaintiffs' challenge to the FECA and the question of their standing is the relationship between law, or its absence, and the status quo. One of the lasting impacts of the Legal Realist movement was its attack upon the theory that the absence of legislation and the reliance on free markets constitutes government neutrality. This theory was at the heart of the pre-New Deal jurisprudence most famously reflected in *Lochner v. New York*, 198 U.S. 95 (1905), in which the Supreme Court invalidated maximum hour labor laws. Regulatory adjustment of free market arrangements was viewed as an improper interference with an otherwise neutral status quo. This view collapsed during the years of the New Deal when it came to be believed that existing distributions of wealth and resources were as much a product of government's decision not to act as it was when government did act. *See* M. Horwitz, *The Transformation of America Law*; 1870-1960 (1992).

Interestingly, one commentator has noted that the premises of *Buckley v. Valeo's* free speech analysis — insisting that the FECA's campaign expenditure limits were unconstitutional as interfering with the "free market" distribution of free speech — are similar to the premises underlying Lochner. *See* Sunstein, *Political Equality and Unintended Consequences*, 94 Col.L.Rev. 1390, 1397 (1994). So too, at the heart of plaintiffs' theory is the notion that the present free market distribution of resources expended on congressional campaigns is structured by the FECA. (This is most clearly revealed by the fact

(Cont'd)

Appendix B

The federal courts of the United States are inherently courts of limited jurisdiction which adjudicate actual cases and controversies. They cannot and may not, therefore, serve as the forum to challenge the absence of a debatably desired piece of legislation for there could be nothing more abstract and theoretical. Such concerns have been reserved by the Constitution to the political branches of our government. Thus, *Buckley v. Valeo* remains the binding and informative precedent for this Court.

In *Buckley,* the Supreme Court held that the plaintiffs had standing to challenge the FECA, in light of traditional standing analysis, because they had 'a personal stake" in a determination of the constitutionality of the statute. The plaintiffs in *Buckley* were actual candidates for election and re-election as well as their potential contributors. In this case, the plaintiffs are a potential candidate who decided not to run and his would-be supporters. These facts clearly make the alleged injury more remote than that alleged in *Buckley.* Moreover, to the extent that they allege a more generalized harm, that they are a few of the "vast majority of the American people [who] lack the means to make large financial contributions to candidates running for the United States Congress," Plaintiffs' Exhibit 1 at 6, a finding of standing is less appropriate as *Allen v. Wright* clearly indicates:

(Cont'd)

that the statute plaintiffs challenge does not legislate a requirement for individuals to contribute to political candidates; it *limits* the amounts that may be contributed.) Therefore, the plaintiffs would hold, challenging the FECA, whether in its entirety or insofar as it relates to private contributions, is appropriate. The absence of laws prohibiting the solicitation and use of private funds or, alternatively, the absence of laws providing equal funding to rival candidates is what plaintiffs challenge via their action against the FECA. While this theory is intriguing, this Court is bound to apply the legal principles and analysis which follows.

Appendix B

> Standing doctrine embraces several judicially self-imposed limits . . . such as . . . the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches. . .

468 U.S. at 751.

The alleged harm of exclusion from what plaintiff asserts is an integral aspect of the electoral process is, at least at this stage of its jurisprudential life, abstract and conjectural. This can best be seen by comparing this case to one in which standing was found on the basis of a more discernable injury, *Fulani v. League of Women Voters Education Fund,* 882 F. 2d 621 (2d Cir. 1989). In that case, actual injury was found in the fact that a third party candidate was deprived of the exposure to be derived from participating in a televised presidential debate. The alleged injury was definable and easily linked to the other steps of the standing analysis. In this case, an injury has been posited that is too remote from its suggested cause. The FECA's contribution limits cannot be directly traced to be the cause of Albanese's decision not to run for Congress in the face of an expected lack of financial support for his undeclared candidacy.

In a similar fashion, plaintiffs' case is distinguishable from the malapportionment cases they seek to rely upon. Those cases dealt with the dilution of votes based upon a measurable population disparity between districts, thereby diluting the "value" of the plaintiffs' votes with respect to their elected representative under a one person/one vote formula. Here, plaintiffs are not suggesting that their votes are diluted on the basis of the number of citizens represented, but that their influence with their Representative is diminished since they

could (or would) not contribute financially to that person's campaign and might, therefore, have less access or influence than a hypothesized wealthy contributor. Again, this claimed injury is abstract and remote in comparison to those in the precedents cited in its support.

Plaintiffs' case is also distinguishable from the filing fee cases. In those cases a candidate seeking to run for office was actually excluded by, typically, an insurmountable filing fee. In the instant case, Plaintiff Albanese was a candidate in 1992 and personally chose not to be a candidate in 1994. If the campaign finance regime affected these events in some manner it is too remote to permit a finding of actual injury traceable to the FECA to give standing to the plaintiffs.[9] *See Lujan*, 112 S. Ct. at 2138; *cf. In Re U.S. Catholic Conf.*, 885 F. 2d 1020, 1030 (2d Cir. 1989), *cert. den.* 495 U.S. 918 (1990). In the final analysis, Albanese opted not to participate in the election process; he was not prevented from doing so.[10]

The last point to be made with respect to plaintiffs' standing to challenge the FECA is in connection with the question of likelihood of redress. The suggestion that this Court is being asked *merely* to declare the FECA unconstitutional insofar as it permits private monies to be used in federal elections and then it will be left to Congress to respond with appropriate legislation is not persuasive. In the context of the foregoing discussion of the

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9. The parties debate the presence or absence of "state action" with regard to this point. Whether or not state action would be found underlying the financing regime, its relationship to plaintiffs case is still too remote.

10. We will never know how much money might have been contributed to an Albanese-For-Congress-'94 campaign and how successful he might have been at the polls in that tumultuous election season.

abstract nature of the alleged injury, this Court would be simply ignoring its limited authority and the bedrock concept of separation of powers underlying the Constitution and the doctrine of standing if it were to enter such a declaratory judgment. Moreover, if plaintiffs' goal is to eliminate the contribution of private funds to politicians and thereby level the electoral playing field, declaring the FECA — a statute which *limits* such contributions — unconstitutional cannot be said to redress plaintiffs' injury.

In light of the foregoing analysis, plaintiffs cannot be deemed to have standing to bring their action against the FECA. Thus, defendants' motions to dismiss this claim pursuant to Rule 12(b)(1) will be granted.

The FECA and Fed.R.Civ.P. 12(b)(6)

In addition to the foregoing analysis which requires that plaintiffs action be dismissed under Rule 12(b)(1), it is also appropriate to note that defendants' motions may be granted for plaintiffs' failure to state a claim upon which relief may be granted. Plaintiffs have challenged the constitutionality of a federal statute which has been previously challenged and found, in well reasoned and persuasive opinions, to be constitutional.

The constitutionality of the FECA was squarely addressed by the United States Supreme Court in *Buckley v. Valeo, supra.* The Court 's concern in *Buckley* was, principally, the limitation upon free speech rights inherent in the contribution limits. Because of First Amendment concerns the Supreme Court rejected that portion of the statute which placed limits upon the use of a candidate's personal funds and overall campaign expenditures. 424 U.S. at 39-59. The Court's reasoning in

Buckley suggests that the essence of plaintiffs' challenge to the FECA has been considered and rejected by the Supreme Court.[11] This Court, in obedience to that precedent must dismiss the challenge to the FECA for failure to state a claim upon which relief may be granted.

Standing to Challenge the "Incumbent Subsidy"

In addition to challenging the FECA, plaintiffs challenge what they refer to as the "incumbent subsidy." Under this heading they include the franking privilege as well as other benefits of incumbency which may aid the re-election efforts of the official such as an office staff and public salary. I will address the latter point first and return to the franking statute.

As mentioned at the outset of this Memorandum, plaintiffs seek a declaratory judgment that

> whenever a Member of the U.S. Congress engages in activity as a candidate for public office, he or she is acting as a private citizen and . . . that, therefore, it is unconstitutional . . . for the U.S. government to provide politically valuable public subsidies to such a candidate that are not shared equally by all other candidates for that office.

The plaintiffs do not define with specificity the activities to which they refer except to mention the use of a press secretary, scheduling assistant, and public salary. Such a claim may

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11. Plaintiffs admit as much when they state in their complaint, at fn.5, that they "ask this Honorable Court to reconsider the U.S. Supreme Court 's 1976 holding in *Buckley v. Valeo*. . . "

founder upon its generality and vagueness alone and require, at a minimum, that it be repleaded with sufficient particularity. However, in light of the prudential considerations raised by this claim this Court can reach a conclusion that it should be dismissed.

Although the precise boundaries of the political-question doctrine are obscure, prominent considerations in defining those boundaries are:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government. . .

Baker v. Carr, 369 U.S. at 217. Some, if not all, of these factors are present here and require the dismissal of this aspect of plaintiffs' complaint on political-question doctrine grounds.

In Article I, Section 5 of the Constitution, one might find a textual commitment of this issue to the legislature in that "[e]ach House may determine the Rules of its Proceedings [and] punish its Members." This is precisely the case with regard to defining what is official and what is personal activity. Consistent with its responsibility for regulating the activities of its Members, the House issues the House Ethics Manual and maintains the House

Ethics Committee to oversee, *inter alia,* that Members properly respect the boundary between appropriate official and personal activities. Additionally, the Office of the General Counsel regularly advises Members on ethical issues. An attempt by this Court to draw the line between official and personal conduct of Members would entail a policy determination of a kind peculiarly suited to the exercise of legislative rather than judicial discretion.

Moreover, for this Court to ignore this constitutional separation of powers and become entangled in the micromanagement of the conduct of Representative Molinari and all other incumbent Members would violate the political-question doctrine and be an affront to the coordinate legislative branch. *See U.S. ex rel. Joseph v. Cannon,* 642 F.2d 1373 (D.C. Cir. 1981); *cf. Winpisinger v. Watson,* 628 F.2d 133 (D.C. Cir.), *cert. den.* 446 U.S. 929 (1980). Thus, it must be rejected.

Unlike their vague challenge to Members' official/personal practices, plaintiffs have stated a specific challenge to the franking statute; namely, that it grants incumbents an unfair advantage toward re-election in violation of the First and Fourteenth Amendments. A series of opinions in the District of Columbia have addressed the constitutionality of the franking statute and standing to bring such challenges. *See Common Cause v. Bolger,* 512 F.Supp. 26 (D.D.C. 1980); *Common Cause v. Bolger,* 574 F.Supp. 672 (D.D.C. 1982) *aff'd* 461 U.S. 911 (1983); *Coalition To End The Permanent Congress v. Runyon,* 979 F.2d 219 (D.C. Cir. 1992); *Virginians Against a Corrupt Congress v. Moran,* 805 F.Supp. 75 (D.D.C. 1992). Those opinions offer a thorough review of the history and purpose of the franking statute.

Appendix B

In *Common Cause* and *Runyon,* plaintiffs were granted standing to bring their challenge while in *Moran* the court insisted plaintiffs first turn to the House Commission on Congressional Mailing Standards. The *Runyon* and *Moran* cases are distinguishable from this case for they were not challenges to the franking statute as a whole, but to a specific section of the statute (repealed by Congress during the course of the litigation) which allowed an incumbent to mail franked material to citizens who were subsequently to become constituents through district reapportionment. The *Common Cause* proceedings challenged the statute as a whole and, therefore, analogously inform this case as well.

Central to the panel's analysis in *Common Cause* were the facts that the plaintiff organization was composed of members who were actual candidates for elective office as well as actual contributors and campaign workers for those candidates. In this case, the plaintiffs are a would-be candidate who chose not to run and his supporters whose possible actions on his behalf were frustrated by his decision not to run. It is reasonable to suggest that on this basis plaintiffs challenge to the frank should be dismissed for lack of standing as was their challenge to the FECA. However, even if one were to suggest that standing should be granted, plaintiffs case must be dismissed for failure to state a claim upon which relief may be granted.

The Frank and 12(b)(6)

In *Common Cause* the gravamen of plaintiffs' challenge was that the frank,

> "in essence . . . provides an unconstitutional 'subsidy' to incumbent candidates for

> Congress because franked mail inevitably has the effect of aiding Members' reelection efforts. Plaintiffs reason that because they are not afforded similar campaign advantages [the franking statute] abridges their First Amendment rights to associate freely for the advancement of political beliefs, as well as deprives them of equal protection under the due process clause of the Fifth Amendment.

574 F.Supp at 673. The three judge court rejected plaintiffs' claims. The *Common Cause* court reached this result after having received extensive fact submissions on the basis of discovery conducted by the litigants. 574 F.Supp at 681. Thus, this challenge was fully heard and decided upon its merits.

The decision of the District of Columbia panel affirmed by the Supreme Court brings to mind the Supreme Court's admonition that a "heavy presumption of constitutionality" attaches to the " 'carefully considered decision[s] of a coequal and representative branch of our government.' " *Department of Labor v. Triplett*, 494 U.S. 715, 721 (1990). In this case, this presumption is exponentially strengthened by the claim having been previously fully adjudicated.

Moreover, it must again be noted that plaintiffs have not claimed that the rules governing the use of the frank have been violated. What they claim is that the rules themselves are unconstitutional.[12] Thus, in the absence of such a claim of abuse

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12. At oral argument, plaintiffs' counsel stated that the problem with the statute, in their eyes, is that "the statute doesn't define what we see as abuse as (Cont'd)

of the franking statute, it follows that "[t]he conceded and undisputed legitimate interests [namely, consistent communication between citizens and their elected representatives] promoted by the franking statute are sufficient to justify the limited impacts on the rights of [the plaintiffs]." *Common Cause*, 574 F.Supp. at 683.

In light of the foregoing, this Court is driven to conclude that the plaintiffs can prove no set of facts in support of their claim against the franking statute which would entitle them to the relief they seek. Thus, this last aspect of plaintiffs' case must be dismissed.

CONCLUSION

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U. S. at 17. The integrity of the process by which one exercises that precious right is inseparable from the right itself. To the extent that the plaintiffs believe that a modification of the process would enhance its integrity, they must make the case for the validity of that belief with the political branches of our government. For just as fundamental to the political order of this democracy is the doctrine of separation of powers and the limited jurisdiction conferred upon the federal judiciary within that political order. *See The Federalist*, Nos. 47, 80. That jurisdiction is limited by principles of standing and by the wise exercise of restraint and self-discipline in resisting invitations to resolve political questions.

(Cont'd)
abuses at all." Transcript at 35. Presumably, this is why plaintiffs have not brought their claims before the franking commission as provided for in 2 U.S.C. § 501.

Appendix B

For the foregoing reasons, defendants' motions to dismiss the complaint are granted.

SO ORDERED.

Dated: April 17, 1995
Brooklyn, New York

s/ I. Leo Glasser
I. LEO GLASSER, U.S.D.J.

Appendix B

Copies of the foregoing Memorandum and Order were mailed this day to:

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Jamin Raskin, Esq.
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Federal Election Commission
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APPENDIX C — RELEVANT STATUTES

THE FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED, 2 U.S.C. § 431 *ET SEQ.*

§ 431. Definitions

When used in this Act:

(1) The term "election" means —

(A) a general, special, primary, or runoff election;

(B) a convention or caucus of a political party which has authority to nominate a candidate;

(C) a primary election held for the selection of delegates to a national nominating convention of a political party; and

(D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

(2) The term "candidate" means an individual who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election

(A) if such individual has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000; or

(B) if such individual has given his or her consent to another person to receive contributions or make

expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of $5,000 or has made such expenditures aggregating in excess of $5,000.

(3) The term "Federal office" means the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress.

(4) The term "political committee" means —

(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year; or

(B) any separate segregated fund established under the provisions of section 441b(b) of this title; or

(C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) aggregating in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year.

(5) The term "principal campaign committee" means a political committee designated and authorized by a candidate under section 432(e)(1) of this title.

Appendix C

(6) The term "authorized committee" means the principal campaign committee or any other political committee authorized by a candidate under section 432(e)(1) of this title to receive contributions or make expenditures on behalf of such candidate.

(7) The term "connected organization" means any organization which is not a political committee but which directly or indirectly establishes, administers, or financially supports a political committee.

(8) (A) The term "contribution" includes —

(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or

(ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

(B) The term "contribution" does not include —

(i) the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee;

(ii) the use of real or personal property, including a church or community room used on a regular basis by members of a community for noncommercial purposes, and the cost of invitations, food, and

beverages, voluntarily provided by an individual to any candidate or any political committee of a political party in rendering voluntary personal services on the individual's residential premises or in the church or community room for candidate-related or political party-related activities, to the extent that the cumulative value of such invitations, food, and beverages provided by such individual on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(iii) the sale of any food or beverage by a vendor for use in any candidate's campaign or for use by or on behalf of any political committee of a political party at a charge less than the normal comparable charge, if such charge is at least equal to the cost of such food or beverage to the vendor, to the extent that the cumulative value of such activity by such vendor on behalf of any single candidate does r not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(iv) any unreimbursed payment for travel expenses made by any individual on behalf of any candidate or any political committee of a political party, to the extent that the cumulative value of such activity by such individual on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(v) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public offce for which an election is held in the State in which such committee is organized, except that this clause shall not apply to any cost incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(vi) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization;

(vii) any loan of money by a State bank, a federally chartered depository institution, or a depository institution the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration, other than any overdraft made with respect to a checking or savings account, made in accordance with applicable law and in the ordinary course of business, but such loan —

(I) shall be considered a loan by each endorser or guarantor, in that proportion of the unpaid balance that each endorser or guarantor bears to the total number of endorsers or guarantors;

(II) shall be made on a basis which assures repayment, evidenced by a written instrument, and subject to a due date or amortization schedule; and

(III) shall bear the usual and customary interest rate of the lending institution;

(viii) any gift, subscription, loan, advance, or deposit of money or anything of value to a national or a State committee of a political party specifically designated to defray any cost for construction or purchase of any office facility not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office;

(ix) any legal or accounting services rendered to or on behalf of —

(I) any political committee of a political party if the person paying for such services is the regular employer of the person rendering such services and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) an authorized committee of a candidate or any other political committee, if the person paying for such services is the regular employer of the individual rendering such services and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of Title 26,

but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 434(b) of this title by the committee receiving such services;

(x) the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: *Provided,* That —

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(xi) the payment by a candidate, for nomination or election to any public office (including State or local office), or authorized committee of a candidate, of the costs of campaign materials which include information on or reference to any other candidate and which are used in connection with volunteer activities (including pins, bumper stickers, handbills, brochures,

posters, and yard signs, but not including the use of broadcasting, newspapers, magazines, billboards, direct mail, or similar types of general public communication or political advertising): *Provided,* That such payments are made from contributions subject to the limitations and prohibitions of this Act;

(xii) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided,* That —

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates;

(xiii) payments made by a candidate or the authorized committee of a candidate as a condition of ballot access and payments received by any political party committee as a condition of ballot access; and

(xiv) any honorarium (within the meaning of section 441i of this title).

(9)(A) The term "expenditure" includes —

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and

(ii) a written contract, promise, or agreement to make an expenditure.

(B) The term "expenditure" does not include —

(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) nonpartisan activity designed to encourage individuals to vote or to register to vote;

(iii) any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office, except that the costs

incurred by a membership organization (including a labor organization) or by a corporation directly attributable to a communication expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate), shall, if such costs exceed $2,000 for any election, be reported to the Commission in accordance with section 434(a)(4)(A)(i) of this title, and in accordance with section 434(a)(4)(A)(ii) of this title with respect to any general election;

(iv) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed state card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(v) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization;

(vi) any costs incurred by an authorized committee or candidate in connection with the

solicitation of contributions on behalf of such candidate, except that this clause shall not apply with respect to costs incurred by an authorized committee of a candidate in excess of an amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 441a(b) of this title, but all such costs shall be reported in accordance with section 434(b) of this title;

(vii) the payment of compensation for legal or accounting services —

(I) rendered to or on behalf of any political committee of a political party if the person paying for such services is the regular employer of the individual rendering such services, and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) rendered to or on behalf of a candidate or political committee if the person paying for such services is the regular employer of the individual rendering such services, and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of Title 26,

but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 434(b) of this title by the committee receiving such services;

Appendix C

(viii) the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: *Provided*, That —

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(ix) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided*, That —

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates; and

(x) payments received by a political party committee as a condition of ballot access which are transferred to another political party committee or the appropriate State official.

(10) The term "Commission" means the Federal Election Commission.

(11) The term "person" includes an individual, partnership, committee, association corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.

(12) The term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(13) The term "identification" means —

(A) in the case of any individual, the name, the mailing address, and the occupation of such individual, as well as the name of his or her employer; and

(B) in the case of any other person, the full name and address of such person.

(14) The term "national committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Commission.

(15) The term "State committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission.

(16) The term "political party" means an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization.

(17) The term "independent expenditure" means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

(18) The term "clearly identified" means that —

(A) the name of the candidate involved appears;

(B) a photograph or drawing of the candidate appears; or

(C) the identity of the candidate is apparent by unambiguous reference.

(19) The term "Act" means the Federal Election Campaign Act of 1971 as amended.

§ 432. Organization of political committees

(a) Treasurer vacancy; official authorization. Every political committee shall have a treasurer. No contribution or expenditure shall be accepted or made by or on behalf of a political committee during any period in which the office of treasurer is vacant. No expenditure shall be made for or on behalf of a political committee without the authorization of the treasurer or his or her designated agent.

(b) Account of contributions; segregated funds.

(1) Every person who receives a contribution for an authorized political committee shall, no later than 10 days after receiving such contribution, forward to the treasurer such contribution, and if the amount of the contribution is in excess of $50 the name and address of the person making the contribution and the date of receipt.

(2) Every person who receives a contribution for a political committee which is not an authorized committee shall

(A) if the amount of the contribution is $50 or less, forward to the treasurer such contribution no later than 30 days after receiving the contribution; and

(B) if the amount of the contribution is in excess

of $50, forward to the treasurer such contribution, the name and address of the person making the contribution, and the date of receipt of the contribution, no later than 10 days after receiving the contribution.

(3) All funds of a political committee shall be segregated from, and may not be commingled with, the personal funds of any individual.

(c) Recordkeeping. The treasurer of a political committee shall keep an account of

(1) all contributions received by or on behalf of such political committee;

(2) the name and address of any person who makes any contribution in excess of $50, together with the date and amount of such contribution by any person;

(3) the identification of any person who makes a contribution or contributions aggregating more than $200 during a calendar year, together with the date and amount of any such contribution; and

(4) the identification of any political committee which makes a contribution, together with the date and amount of any such contribution; and

(5) the name and address of every person to whom any disbursement is made, the date, amount,

and purpose of the disbursement, and the name of the candidate and the office sought by the candidate, if any, for whom the disbursement was made, including a receipt, invoice, or canceled check for each disbursement in excess of $200.

(d) Preservation of records and copies of reports
The treasurer shall preserve all records required to be kept by this section and copies of all reports required to be filed by this title for 3 years after the reports is filed. For any report filed in electronic format under section 304(a)(11), the treasurer shall retain a machine-readable copy of the report as the copy preserved under the preceding sentence.

(e) Principal and additional campaign committees; designations, status of candidate, authorized committees, etc.

(1) Each candidate for Federal office (other than the nominee for the office of Vice President) shall designate in writing a political committee in accordance with paragraph (3) to serve as the principal campaign committee of such candidate. Such designation shall be made no later than 15 days after becoming a candidate. A candidate may designate additional political committees in accordance with paragraph (3) to serve as authorized committees of such candidate. Such designation shall be in writing and filed with the principal campaign committee of such candidate in accordance with subsection (f)(1).

Appendix C

(2) Any candidate described in paragraph (1) who receives a contribution, or any loan for use in connection with the campaign of such candidate for election, or makes a disbursement in connection with such campaign, shall be considered, for purposes of this Act, as having received the contribution or loan, or as having made the disbursement, as the case may be, as an agent of the authorized committee or committees of such candidate.

(3)(A) No political committee which supports or has supported more than one candidate may be designated as an authorized committee, except that

> **(i)** the candidate for the office of President nominated by a political party may designate the national committee of such political party as a principal campaign committee, but only if that national committee maintains separate books of account with respect to its function as a principal campaign committee; and
>
> **(ii)** candidates may designate a political committee established solely for the purpose of joint fundraising by such candidates as an authorized committee.

(B) As used in this section, the term "support" does not include a contribution by any authorized committee in amounts of $1,000 or less to an authorized committee of any other candidate.

(4) The name of each authorized committee shall include the name of the candidate who authorized such committee under

paragraph (1). In the case of any political committee which is not an authorized committee, such political committee shall not include the name of any candidate in its name.

(5) The name of any separate segregated fund established pursuant to section 316(b) [2 USCS § 441b(b)] shall include the name of its connected organization.

(f) Filing with and receipt of designations, statements, and reports by principal campaign committee.

(1) Notwithstanding any other provision of this Act, each designation, statement, or report of receipts or disbursements made by an authorized committee of a candidate shall be filed with the candidate's principal campaign committee.

(2) Each principal campaign committee shall receive all designations, statements, and reports required to be filed with it under paragraph (1) and shall compile and file such designations, statements, and reports in accordance with this Act.

(g) Filing with and receipt of designations, statements, and reports by Secretary of the Senate; forwarding to Commission; filing requirements with Commission; public inspection and preservation of designations, etc.

(1) Designations, statements, and reports required to be filed under this Act by a candidate for the office of Senator, and by the principal campaign committee of such candidate, shall be filed with the Secretary of the Senate, who shall receive such designations, statements, and reports, as custodian for the Commission.

(2) The Secretary of the Senate shall forward a copy of any designation, statement, or report filed with the Secretary under this subsection to the Commission as soon as possible (but no later than 2 working days) after receiving such designation, statement, or report.

(3) All designations, statements, and reports required to be filed under this Act, except designations, statements, and reports filed in accordance with paragraph (1), shall be filed with the Commission.

(4) The Secretary of the Senate shall make the designations, statements, and reports received under this subsection available for public inspection and copying in the same manner as the Commission under section 311(a)(4) [2 USCS § 438(a)(4)], and shall preserve such designations, statements, and reports in the same manner as the Commission under section 311(a)(5) [2 USCS § 438(a)(5)].

(h) Campaign depositories; designations, maintenance of accounts, etc.; petty cash fund for disbursements; record of disbursements.

(1) Each political committee shall designate one or more State banks, federally chartered depository institutions, or depository institutions the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration, as its campaign depository or depositories. Each political committee shall maintain at least one checking account and such other accounts

as the committee determines at a depository designated by such committee. All receipts received by such committee shall be deposited in such accounts. No disbursements may be made (other than petty cash disbursements under paragraph (2)) by such committee except by check drawn on such accounts in accordance with this section.

(2) A political committee may maintain a petty cash fund for disbursements not in excess of 100 to any person in connection with a single purchase or transaction, A record of all petty cash disbursements shall be maintained in accordance with subsection (c)(5).

(i) Reports and records, compliance with requirements based on best efforts. When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [2 USCS §§ 9001 et seq. or 9031 et seq.].

§ 433. Registration of political committees

(a) Statements of organizations

Each authorized campaign committee shall file a statement of organization no later than 10 days after designation pursuant to section 432(e)(1) of this title. Each separate segregated fund established under the provisions of section 441b(b) of this title shall file a statement of organization no later than 10 days after establishment. All other committees shall file a statement of

organization within 10 days after becoming a political committee within the meaning of section 431(4) of this title.

(b) Contents of statements

The statement of organization of a political committee shall include —

(1) the name, address, and type of committee;

(2) the name, address, relationship, and type of any connected organization or affiliated committee;

(3) the name, address, and position of the custodian of books and accounts of the committee;

(4) the name and address of the treasurer of the committee;

(5) if the committee is authorized by a candidate, the name, address, office sought, and party affiliation of the candidate; and

(6) a listing of all banks, safety deposit boxes, or other depositories used by the committee.

(c) Change of information in statements

(1) A political committee may terminate only when such a committee files a written statement, in accordance with section 432(g) of this title, that it will no longer receive any contributions or make any disbursements and that such committee has no outstanding debts or obligations.

(2) Nothing contained in this subsection may be construed to eliminate or limit the authority of the Commission to establish procedures for —

(A) the determination of insolvency with respect to any political committee;

(B) the orderly liquidation of an insolvent political committee, and the orderly application of its assets for the reduction of outstanding debts; and

(C) the termination of an insolvent political committee after such liquidation and application of assets.

§ 434. Reports

(a) Receipts and disbursements by treasurers of political committee; filing requirements.

(1) Each treasurer of a political committee shall file reports of receipts and disbursements in accordance with the provisions of this subsection. The treasurer shall sign each such report.

(2) If the political committee is the principal campaign committee of a candidate for the House of Representatives or for the Senate —

(A) in any calendar year during which there is regularly scheduled election for which such candidate is seeking election, or nomination for election, the treasurer shall file the following reports:

(i) a pre-election report, which shall be filed no later than

the 12th day before (or posted by registered or certified mail no later than the 15th day before) any election in which such candidate is seeking election, or nomination for election, and which shall be complete as of the 20th day before such election;

(ii) a post-general election report, which shall be filed no later than the 30th day after any general election in which such candidate has sought election, and which shall be complete as of the 20th day after such general election; and

(iii) additional quarterly reports, which shall be filed no later than the 15th day after the last day of each calendar quarter, and which shall be complete as of the last day of each calendar quarter: except that the report for the quarter ending December 31 shall be filed no later than January 31 of the following calendar year; and

(B) in any other calendar year the following reports shall be filed:

(i) a report covering the period beginning January 1 and ending June 30, which shall be filed no later than July 31; and

(ii) a report covering the period beginning July 1 and ending December 31, which shall be filed no later than January 31 of the following calendar year.

(3) If the committee is the principal campaign committee of a candidate for the office of President —

(A) in any calendar year during which a general election is held to fill such office —

(i) the treasurer shall file monthly reports if such committee has on January 1 of such year, received contributions aggregating $100,000 or made expenditures aggregating $100,000 or anticipates receiving contributions aggregating $100,000 or more or making expenditures aggregating $100,000 or more during such year: such monthly reports shall be filed no later than the 20th day after the last day of each month and shall be complete as of the last day of the month, except that, in lieu of filing the report otherwise due in November and December, a pre-general election report shall be filed in accordance with paragraph (2)(A)(i), a post-general election report shall be filed in accordance with paragraph (2)(A)(ii), and a year end report shall be filed no later than January 31 of the following calendar year:

(ii) the treasurer of the other principal campaign committees of a candidate for the office of President shall file a pre-election report or reports in accordance with paragraph (2)(A)(i), a post-general election report in accordance with paragraph (2)(A)(ii), and quarterly reports in accordance with paragraph (2)(A)(iii); and

(iii) if at any time during the election year a committee filing under paragraph (3)(A)(ii) receives contributions in excess of $100,000 or makes expenditures in excess of $100,000, the treasurer shall begin filing monthly reports under paragraph (3)(A)(i) at the next reporting period; and

(B) in any other calendar year, the treasurer shall file either—

(i) monthly reports, which shall be filed no later than the 20th day after the last day of each month and shall be complete as of the last day of the month; or

(ii) quarterly reports, which shall be filed no later than the 15th day after the last day of each calendar quarter and which shall be complete as of the last day of each calendar quarter.

(4) All political committees other than authorized committees of a candidate shall file either —

(A)(i) quarterly reports, in a calendar year in which a regularly scheduled general election is held, which shall be filed no later than the 15th day after the last day of each calendar quarter: except that the report for the quarter ending on December 31 of such calendar year shall be filed no later than January 31 of the following calendar year;

(ii) a pre-election report, which shall be filed no later than the 12th day before (or posted by registered or certified mail no later than the 15th day before) any election in which the committee makes a contribution to or expenditure on behalf of a candidate in such election, and which shall be complete as of the 20th day before the election:

(iii) a post-general election report, which shall be filed no later than the 30th day after the general election and which shall be complete as of the 20th day after such general election; and

(iv) in any other calendar year, a report covering the period beginning January 1 and ending June 30, which shall be filed no later than July 31 and a report covering the period beginning July 1 and ending December 31, which shall be filed no later than January 31 of the following calendar year; or

(B) monthly reports in all calendar years which shall be filed no later than the 20th day after the last day of the month and

shall be complete as of the last day of the month except that, in lieu of filing the reports otherwise due in November and December of any year in which a regularly scheduled general election is held, a pre-general election report shall be filed in accordance with paragraph (2)(A)(i), a post-general election report shall be filed in accordance with paragraph (2)(A)(ii), and a year end report shall be filed no later than January 31 of the following calendar year.

(5) If a designation, report, or statement filed pursuant to this Act (other than under paragraph (2)(A)(i) or (4)(A)(ii)) is sent by registered or certified mail, the United States postmark shall be considered the date of filing of the designation, report, or statement.

(6)(A) The principal campaign committee of a candidate shall notify the Secretary or the Commission, and the Secretary of State, as appropriate, in writing, of any contribution of $1,000 or more received by any authorized committee of such candidate after the 20th day, but more than 48 hours before, any election. This notification shall be made within 48 hours after the receipt of such contribution and shall include the name of the candidate and the office sought by the candidate, the identification of the contributor, and the date of receipt and amount of the contribution.

(B) The notification required under this paragraph shall be in addition to all other reporting requirements under this Act.

(7) The reports required to be filed by this subsection shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous report during such year, only the amount need be carried forward.

Appendix C

(8) The requirement for a political committee to file a quarterly report under paragraph (2)(A)(iii) or paragraph (4)(A)(i) shall be waived if such committee is required to file a pre-election report under paragraph (2)(A)(i), or paragraph (4)(A)(ii) during the period beginning on the 5th day after the close of the calendar quarter and ending on the 15th day after the close of the calendar quarter.

(9) The Commission shall set filing dates for reports to be filed by principal campaign committees of candidates seeking election, or nomination for election, in special elections and political committees filing under paragraph (4)(A) which make contributions to or expenditures on behalf of a candidate or candidates in special elections. The Commission shall require no more than one pre-election report for each election and one post-election report for the election which fills the vacancy. The Commission may waive any reporting obligation of committees required to file for special elections if any report required by paragraph (2) or (4) is required to be filed within 10 days of a report required under this subsection. The Commission shall establish the reporting dates within 5 days of the setting of such election and shall publish such dates and notify the principal campaign committees of all candidates in such election of the reporting dates.

(10) The treasurer of a committee supporting a candidate for the office of Vice President (other than the nominee of a political party) shall file reports in accordance with paragraph (3).

(11) [Caution: For provision that this paragraph is applicable with respect to reports for periods beginning after 12/31/96, see § 1(c) of Act Dec. 28, 1995, P.L. 104-79, which appears as 2 USCS § 432 note.]

Appendix C

(A) The Commission shall permit reports required by this Act to be filed and preserved by means of computer disk or any other appropriate electronic format or method, as determined by the Commission.

(B) In carrying out subparagraph (A) with respect to filing of reports, the Commission shall provide for one or more methods (other than requiring a signature on the report being filed) for verifying reports filed by means of computer disk or other electronic format or method. Any verification under the preceding sentence shall be treated for all purposes (including penalties for perjury) in the same manner as a verification by signature.

(C) As used in this paragraph, the term "report" means, with respect to the Commission, a report, designation, or statement required by this Act to be filed with the Commission.

(b) Contents of report. Each report under this section shall disclose —

(1) the amount of cash on hand at the beginning of the reporting period;

(2) for the reporting period and the calendar year, the total amount of all receipts, and the total amount of all receipts in the following categories:

(A) contributions from persons other than political committees;

(B) for an authorized committee, contributions from the candidate;

(C) contributions from political party committees;

(D) contributions from other political committees;

(E) for an authorized committee, transfers from other authorized committees of the same candidate;

(F) transfers from affiliated committees and, where the reporting committee is a political party committee, transfers from other political party committees, regardless of whether such committees are affiliated;

(G) for an authorized committee, loans made by or guaranteed by the candidate;

(H) all other loans;

(I) rebates, refunds, and other offsets to operating expenditures;

(J) dividends, interest, and other forms of receipts; and

(K) for an authorized committee of a candidate for the office of President, Federal funds received under chapter 95 and chapter 96 of the Internal Revenue Code of 1954 [26 USCS §§ 9001 et seq. and 9031 et seq.]

(3) the identification of each —

(A) person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year, or in

any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution;

(B) political committee which makes a contribution to the reporting committee during the reporting period, together with the date and amount of any such contribution;

(C) authorized committee which makes a transfer to the reporting committee;

(D) affiliated committee which makes a transfer to the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds to the reporting committee from another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfer;

(E) person who makes a loan to the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and the date and amount or value of such loan;

(F) person who provides a rebate, refund, or other offset to operating expenditures to the reporting committee in an aggregate amount or value in excess of $200 within the calendar year, together with the date and amount of such receipt; and

(G) person who provides any dividend, interest, or other receipt to the reporting committee in an aggregate value or amount in excess of $200 within the calendar year, together with the date and amount of any such receipt;

(4) for the reporting period and the calendar year, the total

amount of all disbursements, and all disbursements in the following categories:

(A) expenditures made to meet candidate or committee operating expenses;

(B) for authorized committees, transfers to other committees authorized by the same candidate;

(C) transfers to affiliated committees and, where the reporting committee is a political party committee, transfers to other political party committees, regardless of whether they are affiliated;

(D) for an authorized committee, repayment of loans made by or guaranteed by the candidate:

(E) repayment of all other loans;

(F) contribution refunds and other offsets to contributions;

(G) for an authorized committee, any other disbursements;

(H) for any political committee other than an authorized committee —

(i) contributions made to other political committees;

(ii) loans made by the reporting committees;

(iii) independent expenditures;

(iv) expenditures made under section 315(d) of this Act [2 USCS § 441a(d)] and

(v) any other disbursements; and

(I) for an authorized committee of a candidate for the office of President, disbursements not subject to the limitation of section 315(b) [2 USCS § 441a(b)];

(5) the name and address of each —

(A) person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure;

(B) authorized committee to which a transfer is made by the reporting committee;

(C) affiliated committee to which a transfer is made by the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds by the reporting committee to another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfers;

(D) person who receives a loan repayment from the reporting committee during the reporting period, together with the date and amount of such loan repayment; and

(E) person who receives a contribution refund or other offset to contributions from the reporting committee where such contribution was reported under paragraph (3)(A) of this subsection, together with the date and amount of such disbursement;

(6)(A) for an authorized committee, the name and address of each person who has received any disbursement not disclosed under paragraph (5) in an aggregate amount or value in excess of $200 within the calendar year, together with the date and amount of any such disbursement;

(B) for any other political committee, the name and address of each —

(i) political committee which has received a contribution from the reporting committee during the reporting period, together with the date and amount of any such contribution;

(ii) person who has received a loan from the reporting committee during the reporting period, together with the date and amount of such loan;

(iii) person who receives any disbursement during the reporting period in an aggregate amount or value in excess of $200 within the calendar year in connection with an independent expenditure by the reporting committee, together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate, and a certification, under penalty of perjury, whether such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such committee;

(iv) person who receives any expenditure from the reporting committee during the reporting period in connection with an expenditure under section 315(d) in the Act [2 USCS § 441a(d)], together with the date, amount, and purpose of any

such expenditure as well as the name of, and office sought by, the candidate on whose behalf the expenditure is made; and

(v) person who has received any disbursement not otherwise disclosed in this paragraph or paragraph (5) in an aggregate amount or value in excess of $200 within the calendar year from the reporting committee within the reporting period, together with the date, amount, and purpose of any such disbursement;

(7) the total sum of all contributions to such political committee, together with the total contributions less offsets to contributions and the total sum of all operating expenditures made by such political committee, together with total operating expenditures less offsets to operating expenditures, for both the reporting period and the calendar year; and

(8) the amount and nature of outstanding debts and obligations owed by or to such political committee; and where such debts and obligations are settled for less than their reported amount or value, a statement as to the circumstances and conditions under which such debts or obligations were extinguished and the consideration therefor.

(c) Statements by other than political committees; filing; contents; indices of expenditures.

(1) Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under subsection (b)(3)(A) for all contributions received by such person.

(2) Statements required to be filed by this subsection

shall be filed in accordance with subsection (a)(2), and shall include —

(A) the information required by subsection (b)(6)(B)(iii), indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(B) under penalty of perjury, a certification whether or not such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(C) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.

Any independent expenditure (including those described in subsection (b)(6)(B)(iii)) aggregating $1,000 or more made after the 20th day, but more than 24 hours, before any election shall be reported within 24 hours after such independent expenditure is made. Such statement shall be filed with the Secretary or the Commission and the Secretary of State and shall contain the information required by subsection (b)(6)(B)(iii) indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved.

(3) The Commission shall be responsible for expeditiously preparing indices which set forth, on a candidate-by-candidate basis, all independent expenditures separately, including those reported under subsection (b)(6)(B)(iii), made by or for each candidate, as reported under this subsection, and for periodically publishing such indices on a timely pre-election basis.

Appendix C

§ 437. Reports on convention financing —

Each committee or other organization which —

(1) represents a State, or a political subdivision thereof, or any group of persons, in dealing with officials of a national political party with respect to matters involving a convention held in such State or political subdivision to nominate a candidate for the office of President or Vice President, or

(2) represents a national political party in making arrangements for the convention of such party held to nominate a candidate for the office of President or Vice President,

shall, within 60 days following the end of the convention (but not later than 20 days prior to the date on which presidential and vice-presidential electors are chosen), file with the Commission a full and complete financial statement, in such form and detail as it may prescribe, of the sources from which it derived its funds, and the purposes for which such funds were expended.

§ 437c. Feddral Election Commission

(a) Estabilshment; membership; term of office; vacancies; qualifications; compensation; chairman and vice chairman

(1) There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and

with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.

(2)(A) Members of the Commission shall serve for terms of 6 years, except that of the members first appointed —

(i) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1977;

(ii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1979; and

(iii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1981.

(B) A member of the Commission may serve on the Commission after the expiration of his or her term until his or her successor has taken office as a member of the Commission.

(C) An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he or she succeeds.

(D) Any vacancy occurring in the membership of the Commission shall be filled in the same manner as in the case of the original appointment.

(3) Members shall be chosen on the basis of their experience, integrity, impartiality, and good judgment and

members (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall be individuals who, at the time appointed to the Commission, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Federal Government. Such members of the Commission shall not engage in any other business, vocation, or employment. Any individual who is engaging in any other business, vocation, or employment at the time of his or her appointment to the Commission shall terminate or liquidate such activity no later than 90 days after such appointment.

(4) Members of the Commission (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall receive compensation equivalent to the compensation paid at level IV of the Executive Schedule (section 5315 of Title 5).

(5) The Commission shall elect a chairman and a vice chairman from among its members (other than the Secretary of the Senate and the Clerk of the House of Representatives) for a term of one year. A member may serve as chairman only once during any term of office to which such member is appointed. The chairman and the vice chairman shall not be affiliated with the same political party. The vice chairman shall act as chairman in the absence or disability of the chairman or in the event of a vacancy in such office.

(b) Administration, enforcement, and formulation of policy; exclusive Jurisdiction of civil enforcement; Congressional authorities or functions with respect to elections for Federal office

(1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act

and chapter 95 and chapter 96 of Title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.

(2) Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.

(c) Voting requirements; delegation of authorities

All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission. A member of the Commission may not delegate to any person his or her vote or any decisionmaking authority or duty vested in the Commission by the provisions of this Act, except that the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 437d(a) of this title or with chapter 95 or chapter 96 of Title 26.

(d) Meetings

The Commission shall meet at least once each month and also at the call of any member.

(e) Rules for conduct of activities; judicial notice of seal; principal office

The Commission shall prepare written rules for the conduct of its activities, shall have an official seal which shall be

judicially noticed, and shall have its principal office in or near the District of Columbia (but it may meet or exercise any of its powers anywhere in the United States).

(f) Staff director and general counsel; appointment and compensation; appointment and compensation of personnel and procurement of intermittent services by staff director; use ot assistance, personnel, and tacillties ot Federal agencies and departments; counsel tor defense ot actions

(1) The Commission shall have a staff director and a general counsel who shall be appointed by the Commission. The staff director shall be paid at a rate not to exceed the rate of basic pay in effect for level IV of the Executive Schedule (5 U.S.C. 5315). The general counsel shall be paid at a rate not to exceed the rate of basic pay in effect for level V of the Executive Schedule (5 U.S.C. 5316). With the approval of the Commission, the staff director may appoint and fix the pay of such additional personnel as he or she considers desirable without regard to the provisions of Title 5 governing appointments in the competitive service.

(2) With the approval of the Commission, the staff director may procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of Title 5, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-15 of the General Schedule (5 U.S.C. 5332).

(3) In carrying out its responsibilities under this Act, the Commission shall, to the fullest extent practicable, avail itself of the assistance, including personnel and facilities of other agencies and departments of the United States. The heads of such agencies and departments may make available to the

Commission such personnel, facilities, and other assistance, with or without reimbursement, as the Commission may request.

(4) Notwithstanding the provisions of paragraph (2), the Commission is authorized to appear in and defend against any action instituted under this Act, either (A) by attorneys employed in its office, or (B) by counsel whom it may appoint, on a temporary basis as may be necessary for such purpose, without regard to the provisions of Title 5 governing appointments in the competitive service, and whose compensation it may fix without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title. The compensation of counsel so appointed on a temporary basis shall be paid out of any funds otherwise available to pay the compensation of employees of the Commission.

§ 437d. Powers of Commission

(a) Specitic authorities

The Commission has the power —

(1) to require by special or general orders, any person to submit, under oath, such written reports and answers to questions as the Commission may prescribe;

(2) to administer oaths or affirmations;

(3) to require by subpena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

(4) in any proceeding or investigation, to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3);

(5) to pay witnesses the same fees and mileages as are paid in like circumstances in the courts of the United States;

(6) to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 437g(a) (8) of this title) or appeal any civil action in the tl name of the Commission to enforce the provisions of this Act and 1, chapter 95 and chapter 96 of Title 26, through its general counsel;

(7) to render advisory opinions under section 437f of this title;

(8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of Title 5, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of Title 26; and

(9) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

Appendix C

(b) Judicial orders tor compliance with subpenas and orders of Commission; contempt of court

Upon petition by the Commission, any United States district court within the jurisdiction of which any inquiry is being carried on may, in case of refusal to obey a subpena or order of the Commission issued under subsection (a) of this section, issue an order requiring compliance. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(c) Civil liability for disclosure of information

No person shall be subject to civil liability to any person (other than the Commission or the United States) for disclosing information at the request of the Commission.

(d) Concurrent transmissions to Congress or member of budget estimates, etc.; prior submission of legislative recommendations, testimony, or comments on legislation

(1) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of such estimate or request to the Congress.

(2) Whenever the Commission submits any legislative recommendation, or testimony, or comments on legislation, requested by the Congress or by any Member of the Congress, to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress or to the Member requesting the same. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, testimony, or comments

on legislation, to any office or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

(e) Exclusive civil remedy for enforcement

Except tas provided in section 437g(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a)(6) of this section shall be the exclusive civil remedy for the enforcement of the provisions of this Act.

§ 437f. Advisory opinions

(a) Requests by persons, candidates, or authorized committees; subJect matter; time tor response

(1) Not later than 60 days after the Commission receives from a person a complete written request concerning the application of this Act, chapter 95 or chapter 96 of Title 26, or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.

(2) If an advisory opinion is requested by a candidate, or any authorized committee of such candidate, during the 60-day period before any election for Federal office involving the requesting party, the Commission shall render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request.

Appendix C

(b) Procedures appilcable to initial proposal ot rules or regulations, and advisory opinions

Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of Title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

(c) Persons entitled to rely upon opinions; scope of protection tor good faith reliance

(1) Any advisory opinion rendered by the Commission under subsection (a) of this section may be relied upon by —

(A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and

(B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

(2) Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion in accordance with the provisions of paragraph (1) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of Title 26.

(d) Requests made public; submission of written comments by interested public

The Commission shall make public any request made under subsection (a) of this section for an advisory opinion. Before rendering an advisory opinion, the Commission shall accept written comments submitted by any interested party within the 10-day period following the date the request is made public.

§ 437g. Enforcement

(a) Administrative and judicial practice and procedure

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of Title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of Title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities,

determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of Title 26, the Commission shall, thro gh its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4)(A)(i) Except as provided in clause (ii), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of Title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than

90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B)(i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of Title 26, the Commission shall make public such determination.

(5)(A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of Title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of Title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4) (A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of Title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6)(A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of Title 26, by the methods specified in paragraph (4) (A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an

order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of Title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of Title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(7) In any action brought under paragraph (5) or (6), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed,

may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(10) Repealed. Pub.L. 98-620, Title IV, § 402(1)(A), Nov. 8, 1984, 98 Stat. 3357.

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12)(A) Any notification or investigation made under this section shall not be made public by the Commission or by any

person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) Notice to persons not filing required reports prior to institution of enforcement action; publication of identity of persons and unfired reports

Before taking any action under subsection (a) of this section against any person who has failed to file a report required under section 434(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 434(a)(2)(A)(i) of this title, the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 438(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) Reports by Attorney General of apparent violations

Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60

days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) Penalties; defenses; mitigation of offenses

(1) (A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

(B) In the case of a knowing and willful violation of section 441b(b)(3) of this title, the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 441b(b)(3) of this title may incorporate a violation of section 441c(b), 441f, or 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and

the Commission under subsection (a)(4)(A) of this section which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether —

> **(A)** the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);
>
> **(B)** the conciliation agreement is in effect; and
>
> **(C)** the defendant is, with repect to the violation involved, in compliance with the conciliation agreement.

§ 437h. Judicial review

(a) Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc

The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for

declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

(b) Appeal to Supreme Court; time for appeal

Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

§ 438. Administrative provisions

(a) Duties of Commission. The Commission shall —

(1) prescribe forms necessary to implement this Act;

(2) prepare, publish, and furnish to all persons required to file reports and statements under this Act a manual recommending uniform methods of bookkeeping and reporting;

(3) develop a filing, coding, and cross-indexing system consistent with the purpose of this Act;

(4) within 48 hours after the time of the receipt by the Commission of reports and statements filed with it, make them available for public inspection, and copying, at the expense of the person requesting such copying, except that any information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes, other than using the name and address of

any political committee to solicit contributions from such committee. A political committee may submit 10 pseudonyms on each report filed in order to protect against the illegal use of names and addresses of contributors, provided such committee attaches a list of such pseudonyms to the appropriate report. The Secretary or the Commission shall exclude these lists from the public record;

(5) keep such designations, reports, and statements for a period of 10 years from the date of receipt, except that designations, reports, and statements that relate solely to candidates for the House of Representatives shall be kept for 5 years from the date of their receipt;

(6)(A) compile and maintain a cumulative index of designations, reports, and statements filed under this Act, which index shall be published at regular intervals and made available for purchase directly or by mail;

(B) compile, maintain, and revise a separate cumulative index of reports and statements filed by multi-candidate committees, including in such index a list of multi-candidate committees; and

(C) compile and maintain a list of multi-candidate committees, which shall be revised and made available monthly;

(7) prepare and publish periodically lists of authorized committees which fail to file reports as required by this Act;

(8) prescribe rules, regulations, and forms to carry out the provisions of this Act, in accordance with the provisions of subsection (d);

(9) transmit to President and to each House of the Congress no later than June 1 of each year, a report which states in detail the activities of the Commission in carrying out its duties under this Act, and any recommendations for any legislative or other action the Commission considers appropriate; and

(10) serve as a national clearinghouse for the compilation of information and review of procedures with respect to the administration of Federal elections. The Commission may enter into contracts for the purpose of conducting studies under this paragraph. Reports or studies made under this paragraph shall be available to the public upon the payment of the cost thereof, except that copies shall be made available without cost, upon request, to agencies and branches of the Federal Government.

(b) Audits and field investigations. The Commission may conduct audits and field investigations of any political committee required to file a report under section 304 of this Act [2 USCS § 434]. All audits and field investigations concerning the verification for, and receipt and use of, any payments received by a candidate or committee under chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [26 USCS §§ 9001 et seq. or 9031 et seq.] shall be given priority. Prior to conducting any audit under this subsection, the Commission shall perform an internal review of reports filed by selected committees to determine if the reports filed by a particular committee meet the threshold requirements for substantial compliance with the Act. Such thresholds for compliance shall be established by the Commission. The Commission may, upon an affirmative vote of 4 of its members, conduct an audit and field investigation of any committee which does meet the threshold requirements established by the Commission. Such audit shall be commenced within 30 days of such vote, except that any audit of an

authorized committee of a candidate, under the provisions of this subsection, shall be commenced within 6 months of the election for which such committee is authorized.

(c) Statutory provisions applicable to forms and information-gathering activities. Any forms prescribed by the Commission under subsection (a)(l), and any information-gathering activities of the Commission under this Act, shall not be subject to the provisions of section 3512 of title 44, United States Code.

(d) Rules, regulations, or forms; issuance, procedures applicable, etc.

(1) Before prescribing any rule, regulation, or form under this section or any other provision of this Act, the Commission shall transmit a statement with respect to such rule, regulation, or form to the Senate and the House of Representatives, in accordance with this subsection. Such statement shall set forth the proposed rule, regulation, or form, and shall contain a detailed explanation and justification of it.

(2) If either House of the Congress does not disapprove by resolution any proposed rule or regulation submitted by the Commission under this section within 30 legislative days after the date of the receipt of such proposed rule or regulation or within 10 legislative days after the date of receipt of such proposed form, the Commission may prescribe such rule, regulation, or form.

(3) For purposes of this subsection, the term "legislative day" means, with respect to statements transmitted to the Senate, any calendar day on which the Senate is in session, and with

respect to statements transmitted to the House of Representatives, any calendar day on which the House of Representatives is in session.

(4) For purposes of this subsection, the terms "rule" and "regulation" mean a provision or series of interrelated provisions stating a single, separable rule of law.

(5)(A) A motion to discharge a committee of the Senate from the consideration of a resolution relating to any such rule, regulation, or form or a motion to proceed to the consideration of such a resolution, is highly privileged and shall be decided without debate.

(B) Whenever a committee of the House of Representatives reports any resolution relating to any such form, or regulation, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and is not in order to move to reconsider the vote by which the motion is agreed to or disagreed with.

(e) Scope of protection for good faith reliance upon rules or regulations. Notwithstanding any other provision of law, any person who relies upon any rule or regulation prescribed by the Commission in accordance with the provisions of this section and who acts in good faith in accordance with such rule or regulation shall not, as a result of such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [26 USCS §§ 9001 et seq. or 9031 et seq.].

(f) Promulgation of rules, regulations, and forms by Commission and Internal Revenue Service; report to Congress on cooperative efforts. In prescribing such rules, regulations, and forms under this section, the Commission and the Internal Revenue Service shall consult and work together to promulgate rules, regulations, and forms which are mutually consistent. The Commission shall report to the Congress annually on the steps it has taken to comply with this subsection.

§ 439. Statements filed with State officers

(a)(1) A copy of each report and statement required to be filed by any person under this Act shall be filed by such person with the Secretary of State (or equivalent State officer) of the appropriate State, or, if different, the officer of such State who is charged by State law with maintaining State election campaign reports. The chief executive officer of such State shall designate any such officer and notify the Commission of any such designation.

(2) For purposes of this subsection, the term "appropriate State" means —

(A) for statements and reports in connection with the campaign for nomination for election of a candidate to the office of President or Vice President, each State in which an expenditure is made on behalf of the candidate; and

(B) for statements and reports in connection with the campaign for nomination for election, or election, of a candidate to the office of Senator or Representative in, or Delegate or Resident commissioner to, the Congress, the State in which the candidate seeks election; except that political committees other

than authorized committees are only required to file; and Secretaries of State required to keep, that portion of the report applicable to candidates seeking election in that State.

(b) The Secretary of State (or equivalent State officer), or the Officer designated under subsection (a)(1), shall —

(1) receive and maintain in an orderly manner all reports and statements required by this Act to be filed therewith;

(2) keep such reports and statements (either in original filed form or in facsimile copy by microfilm or otherwise) for 2 years after their date of receipt;

(3) make each report and statement filed therewith available as soon as practicable (but within 48 hours of receipt) for public inspection and copying during regular business hours, and permit copying of any such report or statement by hand or by duplicating machine at the request of any person, except that such copying shall be at the expense of the person making the request; and

(4) compile and maintain a current list of all reports and statements pertaining to each candidate.

(c) Subsections (a) and (b) shall not apply with respect to any State that, as determined by the Commission, has a system that permits electronic access to, and duplication of, reports and statements that are filed with the Commission.

§ 439a. Use of contributed amounts for certain purposes

Amounts received by a candidate as contributions that are in

excess of any amount necessary to defray his expenditures, and any other amounts contributed to an individual for the purpose of supporting his or her activities as a holder of Federal office, may be used by such candidate or individual, as the case may be, to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office, may be contributed to any organization described in section 170(c) of Title 26, or may be used for any other lawful purpose, including transfers without limitation to any national, State, or local committee of any political party; except that, with respect to any individual who is not a Senator or Representative in, or Delegate or Resident Commissioner to, the Congress on January 8, 1980, no such amounts may be converted by any person to any personal use, other than to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office.

§ 439c. Authorization of appropriations

There are authorized to be appropriated to the Commission for the purpose of carrying out its functions under this Act, and under chapters 95 and 96 of Title 26, not to exceed $5,000,000 for the fiscal year ending June 30, 1975. There are authorized to be appropriated to the Commission $6,000,000 for the fiscal year ending June 30, 1976, $1,500,000 for the period beginning July 1, 1976, and ending September 30, 1976, $6,000,000 for the fiscal year ending September 30, 1977, $7,811,500 for the fiscal year ending September 30, 1978, and $9,400,000 (of which not more than $400,000 are authorized to be appropriated for the national clearinghouse function described in section 438(a)(10) of this title) for the fiscal year ending September 30, 1981.

Appendix C

§ 441a. Limitations on contributions and expenditures

(a) Dollar limits on contributions

(1) No person shall make contributions —

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate exceed $1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(2) No multicandidate political committee shall make contributions —

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made to a candidate in a year other than the calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that (A) nothing in this sentence shall limit transfers between political committees of funds raised through joint fund raising efforts; (B) for purposes of the limitations provided by paragraph (1) and paragraph (2) all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or

controlled by the State committee of a political party shall not be considered to have been made by a single political committee; and (C) nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if (i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices; (ii) the limitations contained in this Act on contributions by persons are not exceeded by such transfer; and (iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of Title 26. In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection —

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B)(i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and

(C) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(b) Dollar limits on expenditures by candidates for office of President of the United States

(1) No candidate for the office of President of the United

Appendix C

States who is eligible under section 9003 of Title 26 (relating to condition for eligibility for payments) or under section 9033 of Title 26 (relating to eligibility for payments) to receive payments from the Secretary of the Treasury may make expenditures in excess of —

(A) $10,000,000, in the case of a campaign for nomination for election to such office, except the aggregate of expenditures under this subparagraph in any one State shall not exceed the greater of 16 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section), or $200,000; or

(B) $20,000,000 in the case of a campaign for election to such office.

(2) For purposes of this subsection —

(A) expenditures made by or on behalf of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be expenditures made by or on behalf of the candidate of such party for election to the office of President of the United States; and

(B) an expenditure is made on behalf of a candidate, including a vice presidential candidate, if it is made by —

(i) an authorized committee or any other agent of the candidate for purposes of making any expenditure; or

(ii) any person authorized or requested by the

candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

(c) Increases on limits based on increases in price index

(1) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each limitation established by subsection (b) of this section and subsection (d) of this section shall be increased by such percent difference. Each amount so increased shall be the amount in effect for such calendar year.

(2) For purposes of paragraph (1) —

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items — United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means the calendar year 1974.

(d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on

contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e) of this section). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds —

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of —

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(e) Certification and publication of estimated voting age population

During the first week of January 1975, and every subsequent year, the Secretary of Commerce shall certify to the Commission and publish in the Federal Register an estimate of the voting age population of the United States, of each State, and of each congressional district as of the first day of July next preceding the date of certification. The term "voting age population" means resident population, 18 years of age or older.

(f) Prohibited contributions and expenditures

No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section.

(g) Attribution of multi-State expenditures to candidate's expenditure limitation in each State

The Commission shall prescribe rules under which any expenditure by a candidate for presidential nominations for use in 2 or more States shall be attributed to such candidate's

expenditure limitation in each such State, based on the voting age population in such State which can reasonably be expected to be influenced by such expenditure.

(h) Senatorial candidates

Notwithstanding any other provision of this Act, amounts totaling not more than $17,500 may be contributed to a candidate for nomination for election, or for election, to the United States Senate during the year in which an election is held in which he is such a candidate, by the Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees.

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor

organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b)(1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 791(h) of Title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

Appendix C

(3) It shall be unlawful —

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation of his right to refuse to so contribute without any reprisal.

(4)(A) Except as provided in subparagraphs (B), (C), and (D) it shall be unlawful —

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

§ 441c. Contributions by government contractors

(a) Prohibition

It shall be unlawful for any person —

(1) who enters into any contract with the United States or any department or agency thereof either for the rendition of personal services or furnishing any material, supplies, or equipment to the United States or any

department or agency thereof or for selling any land or building to the United States or any department or agency thereof, if payment for the performance of such contract or payment for such material, supplies, equipment, land, or building is to be made in whole or in part from funds appropriated by the Congress, at any time between the commencement of negotiations for and the later of (A) the completion of performance under; or (B) the termination of negotiations for, such contract or furnishing of material, supplies, equipment, land, or buildings, directly or indirectly to make any contribution of money or other things of value, or to promise expressly or impliedly to make any such contribution to any political party, committee, or candidate for public office or to any person for any political purpose or use; or

(2) knowingly to solicit any such contribution from any such person for any such purpose during any such period.

(b) Separate segregated funds

This section does not prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, any separate segregated fund by any corporation, labor organization, membership organization, cooperative, or corporation without capital stock for the purpose of influencing the nomination for election, or election, of any person to Federal office, unless the provisions of section 441b of this title prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, such fund. Each specific prohibition, allowance, and duty applicable to a corporation, labor organization, or separate segregated fund under section 441b of this title applies to a corporation, labor

organization, or separate segregated fund to which this subsection applies.

(c) "Labor organization" defined

For purposes of this section, the term "labor organization" has the meaning given it by section 441b(b)(1) of this title.

§ 441d. Publication and distribution of statements and solicitations; charge for newspaper or magazine space

(a) Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication —

(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or[1]

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;[1]

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1. So in original. The word "or" probably should appear at the end of par. (2).

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

(b) No person who sells space in a newspaper or magazine to a candidate to the agent of a candidate, for use in connection with such candidate's campaign, may charge any amount for such space which exceeds the amount charged for comparable use of such space for other purposes.

§ 441e. Contributions by foreign nationals

(a) It shall be unlawful for a foreign national directly or through any other person to make any contribution of money or other thing of value, or to promise expressly or impliedly to make any such contribution, in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office; or for any person to solicit, accept, or receive any such contribution from a foreign national.

(b) As used in this section, the term "foreign national" means —

(1) a foreign principal, as such term is defined by section 611(b) of Title 22, except that the term "foreign national" shall not include any individual who is a citizen of the United States; or

(2) an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence, as defined by section 1101(a)(20) of Title 8.

Appendix C

§ 441f. Contributions in name of another prohibited

No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

§ 441g. Limitation on contribution of currency

No person shall make contributions of currency of the United States or currency of any foreign country to or for the benefit of any candidate which, in the aggregate, exceed $100, with respect to any campaign of such candidate for nomination for election, or for election, to Federal office.

§ 441h. Fraudulent misrepresentation of campaign authority

No person who is a candidate for Federal office or an employee or agent of such a candidate shall —

(1) fraudulently misrepresent himself or any committee or organization under his control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof; or

(2) willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1).

Appendix C

§ 441i. Acceptance of excessive honorariums

(a) Prohibited practices

No person while an elected or appointed officer or employee of any branch of the Federal Government shall accept any honorarium of more than $2,000 (excluding amounts accepted for actual travel and subsistence expenses for such person and his spouse or an aide to such person, and excluding amounts paid or incurred for any agents' fees or commissions) for any appearance, speech, or article.

(b) Payment of honorarium to charitable organization

Any honorarium, or any part thereof, paid by or on behalf of an elected or appointed officer or employee of any branch of the Federal Government to a charitable organization shall be deemed not to be accepted for the purposes of this section.

(c) Aggregate amount received during any calendar year

For purposes of determining the aggregate amount of honorariums received by a person during any calendar year, amounts returned to the person paying an honorarium before the close of the calendar year in which it was received shall be disregarded.

(d) Time of acceptance of honorarium

For purposes of paragraph (2) of subsection (a) of this section, an honorarium shall be treated as accepted only in the year in which that honorarium is received.

Appendix C

§ 442. Authority to procure technical support and other services and incur travel expenses; payment of such expenses

For the purpose of carrying out his duties under the Federal Election Campaign Act of 1971, the Secretary of the Senate is authorized, from and after July 1, 1972, (1) to procure technical support services, (2) to procure the temporary or intermittent services of individual technicians, experts, or consultants, or organizations thereof, in the same manner and under the same conditions, to the extent applicable, as a standing committee of the Senate may procure such services under section 72a(i) of this title, (3) with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable basis the services of personnel of any such department or agency, and (4) to incur official travel expenses. Payments to carry out the provisions of this paragraph shall be made from funds included in the appropriation "Miscellaneous Items" under the heading "Contingent Expenses of the Senate" upon vouchers approved by the Secretary of the Senate. All sums received by the Secretary under authority of the Federal Election Campaign Act of 1971 shall be covered into the Treasury as miscellaneous receipts.

§ 451. Extension of credit by regulated industries; regulations

The Secretary of Transportation, the Federal Communications Commission, and the Surface Transportation Board shall each maintain[,] its own regulations with respect to the extension of credit, without security, by any person regulated by such Secretary under subpart II of part A of subtitle VII of title 49, United States Code [49 USCS §§ 41101 et seq.], or such Commission or Board, to any candidate for Federal office, or to

any person on behalf of such a candidate, for goods furnished or services rendered in connection with the campaign of such candidate for nomination for election, or election, to such office.

§ 452. Prohibition against use of certain Federal funds for election activities

No part of any funds appropriated to carry out the Economic Opportunity Act of 1964 [42 U.S.C.A. § 2701 et seq.], shall be used to finance, directly or indirectly, any activity designed to influence the outcome of any election to Federal office, or any voter registration activity, or to pay the salary of any officer or employee of the Community Services Administration who, in his official capacity as such an officer or employee, engages in any such activity.

§ 453. State laws affected

The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

§ 454. Partial invalidity

If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected thereby.

§ 455. Period of limitations

(a) No person shall be prosecuted, tried, or punished for any violation on subchapter I of this chapter unless the

indictment is found or the information is instituted within 3 years after the date of the violation.

(b) Notwithstanding any other provision of law —

(1) the period of limitations referred to in subsection (a) of this section shall apply with respect to violations referred to in such subsection committed before, on, or after the effective date of this section; and

(2) no criminal proceeding shall be instituted against any person for any act or omission which was a violation of any provision of subchapter 1 of this chapter, as in effect on December 31, 1974, if such act or omission does not constitute a violation of any such provision, as amended by the Federal Election Campaign Act Amendments of 1974.

Nothing in this subsection shall affect any proceeding pending in any court of the United States on January 1, 1975.

Appendix C

THE CONGRESSIONAL FRANKING STATUTE

39 U.S.C.S. § 3209

§ 3210. Franked mail transmitted by the Vice President, Members of Congress, and congressional officials

(a)(1) It is the policy of the Congress that the privilege of sending mail as franked mail shall be established under this section in order to assist and expedite the conduct of the official business, activities, and duties of the Congress of the United States.

(2) It is the intent of the Congress that such official business, activities, and duties cover all matters which directly or indirectly pertain to the legislative process or to any congressional representative functions generally, or to the functioning, working, or operating of the Congress and the performance of official duties in connection therewith, and shall include, but not be limited to, the conveying of information to the public, and the ',7 requesting of the views of the public, or the views and information of other authority of government, as a guide or a means of assistance in the performance of those functions.

(3) It is the intent of the Congress that mail matter which is frankable specifically includes, but is not limited to—

(A) mail matter to any person and to all agencies and officials of Federal, State, and local governments regarding programs, decisions, and other related matters of public concern or public service, including any matter relating to actions of a past or current Congress;

(B) the usual and customary congressional newsletter or

press release which may deal with such matters as the impact of laws and decisions on State and local governments and individual citizens; reports on public and official actions taken by Members of Congress; and discussions of proposed or pending legislation or governmental actions and the positions of the Members of Congress on, and arguments for or against, such matters;

(C) the usual and customary congressional questionnaire seeking public opinion on any law, pending or proposed legislation, public issue, or subject;

(D) mail matter dispatched by a Member of Congress between his Washington office and any congressional district offices, or between his district offices;

(E) mail matter directed by one Member of Congress to another Member of Congress or to representatives of the legislative bodies of State and local governments;

(F) mail matter expressing congratulations to a person who has achieved some public distinction;

(G) mail matter, including general mass mailings, which consists of Federal laws, Federal regulations, other Federal publications purchased with Federal funds, or publications containing items of general information;

(H) mail matter which consists of voter registration or election information or assistance prepared and mailed in a nonpartisan manner;

(I) mail matter which constitutes or includes a biography or autobiography of any Member of, or Member-elect to, Congress or any biographical or autobiographical material concerning such Member or Member-elect or the spouse or other members of the family of such Member or Member-elect, and which is so mailed as a part of a Federal publication or in response to a specific request therefor and is not included for publicity purposes in a newsletter or other general mass mailing of the Member or Member-elect under the franking privilege; or

(J) mail matter which contains a picture, sketch, or other likeness of any Member or Member-elect and which is so mailed as a part of a Federal publication or in response to a specific request therefor and, when contained in a newsletter or other general mass mailing of any Member or Member-elect, is not of such size, or does not occur with such frequency in the mail matter concerned, as to lead to the conclusion that the purpose of such picture, sketch, or likeness is to advertise the Member or Member-elect rather than to illustrate accompanying text.

(4) It is the intent of the Congress that the franking privilege under this section shall not permit, and may not be used for the transmission through the mails as franked mail, of matter which in its nature is purely personal to the sender or to any other person and is unrelated to the official business, activities, and duties of the public officials covered by subsection (b)(1) of this section.

(5) It is the intent of the Congress that a Member of or Member-elect to Congress may not mail as franked mail—

(A) mail matter which constitutes or includes any

article, account, sketch, narration, or other text laudatory and complimentary of any Member of, or Member-elect to, Congress on a purely personal or political basis rather than on the basis of performance of official duties as a Member or on the basis of activities as a Member-elect;

(B) mail matter which constitutes or includes—

(i) greetings from the spouse or other members of the family of such Member or Member-elect unless it is a brief reference in otherwise frankable mail;

(ii) reports of how or when such Member or Member-elect, or the spouse or any other member of the family of such Member or Member-elect, spends time other than in the performance of, or in connection with, the legislative, representative, and other official functions of such Member or the activities of such Member-elect as a Member-elect; or

(iii) any card expressing holiday greetings from such Member or Member-elect; or

(C) mail matter which specifically solicits political support for the sender or any other person or any political party, or a vote or financial assistance for any candidate for any public office.

The House Commission on Congressional Mailing Standards and the Select Committee on Standards and Conduct of the Senate shall prescribe for their respective Houses such rules and regulations and shall take such other action, as the Commission or Committee considers necessary and proper for the Members

and Members-elect to conform to the provisions of this clause and applicable rules and regulations. Such rules and regulations shall include, but not be limited to, provisions prescribing the time within which such mailings shall be mailed at or delivered to any postal facility to attain compliance with this clause and the time when such mailings shall be deemed to have been so mailed or delivered and such compliance attained.

(6)(A) It is the intent of Congress that a Member of, or Member-elect to, Congress may not mail any mass mailing as franked mail—

(i) if the mass mailing is postmarked fewer than 60 days immediately before the date of any primary election or general election (whether regular, special, or runoff in which the Member is a candidate for reelection; or

(ii) in the case of a Member of, or Member-elect to, the House who is a candidate for any other public office, if the mass mailing—

(I) is prepared for delivery within any portion of the jurisdiction of or the area covered by the public office which is outside the area constituting the congressional district from which the Member or Member-elect was elected; or

(II) is postmarked fewer than 60 days immediately before the date of any primary election or general election (whether regular, special, or runoff in which the Member or Member-elect is a candidate for any other public office.

(B) Any mass mailing which is mailed by the chairman of any organization referred to in the last sentence of section 3215 of this title which relates to the normal and regular business of the organization may be mailed without regard to the provisions of this paragraph.

(C) No Member of the Senate may mail any mass mailing as franked mail if such mass mailing is postmarked fewer than 60 days immediately before the date of any primary election or general election (whether regular, special, or runoff for any national, State or local office in which such Member is a candidate for election.

(D) The Select Committee on Ethics of the Senate and the House Commission on Congressional Mailing Standards shall prescribe for their respective Houses rules and regulations, and shall take other action as the Committee or the Commission considers necessary and proper for Members and Members-elect to comply with the provisions of this paragraph and applicable rules and regulations. The rules and regulations shall include provisions prescribing the time within which mailings shall be mailed at or delivered to any postal facility and the time when the mailings shall be deemed to have been mailed or delivered to comply with the provisions of this paragraph.

(E) As used in this section, the term "mass mailing" means, with respect to a session of Congress, any mailing of newsletters or other pieces of mail with substantially identical content (whether such mail is deposited singly or in bulk, or at the same time or different times), totaling more than 500 pieces in that session, except that such term does not include any mailing—

(i) of matter in direct ,response to a communication from a person to whom the matter is mailed;

(ii) from a Member of Congress to other Members of Congress, or to Federal, State, or local government officials; or

(iii) of a news release to the communications media.

(F) For purposes of subparagraphs (A) and (C) if mail matter is of a type which is not customarily postmarked, the date on which such matter would have been postmarked if it were of a type customarily postmarked shall apply.

(7) A Member of the House of Representatives may not send any mass mailing outside the congressional district from which the Member was elected.

(b)(1) The Vice President, each Member of or Member-elect to Congress, the Secretary of the Senate, the Sergeant at Arms of the Senate, each of the elected officers of the House of Representatives (other than a Member of the House), the Legislative Counsels of the House of Representatives and the Senate, the Law Revision Counsel of the House of Representatives, and the Senate Legal Counsel may send, as franked mail, matter relating to their official business, activities, and duties, as intended by Congress to be mailable as franked mail under subsection (a)(2) and (3) of this section.

(2) If a vacancy occurs in the Office of the Secretary of the Senate, the Sergeant at Arms of the Senate, an elected officer of the House of Representatives (other than a Member of the

House), the Legislative Counsel of the House of Representatives or the Senate, the Law Revision Counsel of the House of Representatives, or the Senate Legal Counsel any authorized person may exercise the franking privilege in the officer's name during the period of the vacancy.

(3) The Vice President, each Member of Congress, the Secretary of the Senate, the Sergeant at Arms of the Senate, and each of the elected officers of the House (other than a Member of the House), during the 90-day period immediately following the date on which they leave office, may send, as franked mail, matter on official business relating to the closing of their respective offices. The House Commission on Congressional Mailing Standards and the Select Committee on Standards and Conduct of the Senate shall prescribe for their respective Houses such rules and regulations, and shall take such other action as the Commission or Committee considers necessary and proper, to carry out the provisions of this paragraph.

(c) Franked mail may be in any form appropriate for mail matter, including, but not limited to, correspondence, newsletters, questionnaires, recordings, facsimiles, reprints, and reproductions. Franked mail shall not include matter which is intended by Congress to be nonmailable as franked mail under subsection (a)(4) and (5) of this section.

(d)(1) A Member of Congress may mail franked mail with a simplified form of address for delivery within that area constituting the congressional district or State from which the Member was elected.

(2) A Member-elect to the Congress may mail franked mail with a simplified form of address for delivery within that area

constituting the congressional district or the state from which he was elected.

(3) A Delegate, Delegate-elect, Resident Commissioner, or Resident Commissioner-elect to the House of Representatives may mail franked mail with a simplified form of address for delivery within the area from which he was elected.

(4) Any franked mail which is mailed under this subsection shall be mailed 3 at the equivalent rate of postage which assures that the mail will be sent by the most economical means practicable.

(5) The Senate Committee on Rules and Administration and the House Commission on Congressional Mailing Standards shall prescribe for their respective Houses rules and regulations governing any franked mail which is mailed under this subsection and shall by regulation limit the number of such mailings allowed under this subsection.

(6)(A) Any Member of, or Member-elect to, the House of Representatives entitled to make any mailing as franked mail under this subsection shall, before making any mailing, submit a sample or description of the mail matter involved to the House Commission on Congressional Mailing Standards for an advisory opinion as to whether the proposed mailing is in compliance with the provisions of this subsection.

(B) The Senate Select Committee on Ethics may require any Member of, or Member-elect to, the Senate entitled to make any mailings as franked mail under this subsection to submit a sample or description of the mail matter to the Committee for an advisory opinion as to

whether the proposed mailing is in compliance with the provisions of this subsection.

(7) Franked mail mailed with a simplified form of address under this subsection—

(A) shall be prepared as directed by the Postal Service; and

(B) may be delivered to—

(i) each box holder or family on a rural or star route;

(ii) each post office box holder; and

(iii) each stop or box on a city carrier route.

(8) For the purposes of this subsection, a congressional district includes, in the case of a Representative at Large or Representative at Large-elect, the State from which he was elected.

(e) The frankability of mail matter shall be determined under the provisions of this section by the type and content of the mail sent, or to be sent.

(f) Any mass mailing which otherwise would be permitted to be mailed as franked mail under this section shall not be so mailed unless the cost of preparing and printing the mail matter is paid exclusively from funds appropriated by Congress, except that an otherwise frankable mass mailing may contain, as an enclosure or supplement, any public service material which is purely instructional or informational in nature, and which in not is frankable under this section.

(g) Notwithstanding any other provision of Federal, State, or local law, or any regulation thereunder, the equivalent amount of postage determined under section 3216 of this title on franked mail mailed under the frank of the Vice President or a Member of Congress, and the cost of preparing or printing such frankable matter for such mailing under the frank, shall not be considered as a contribution to, or an expenditure by, the Vice President or a Member of Congress for the purpose of determining any limitation on expenditures or contributions with respect to any such official, imposed by any Federal, State, or local law or regulation, in connection with any campaign of such official for election to any Federal office.

(2)

Supreme Court, U.S.
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No. 95-1990

In the Supreme Court of the United States

OCTOBER TERM, 1995

SAL F. ALBANESE, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR FEDERAL ELECTION COMMISSION IN OPPOSITION AND FOR THE UNITED STATES AS AMICUS CURIAE

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17 pp

QUESTIONS PRESENTED

1. Whether petitioners have standing to challenge the constitutionality of the Federal Election Campaign Act of 1971, 2 U.S.C. 431-455, on the ground that it does not prohibit private citizens' campaign contributions to candidates for federal office.

2. Whether the courts below correctly rejected petitioners' constitutional challenge to the congressional franking privilege, 39 U.S.C. 3210.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Allen v. *Wright*, 468 U.S. 737 (1984)	8
Baker v. *Carr*, 369 U.S. 186 (1962)	11
Brown v. *Board of Education*, 347 U.S. 483 (1954)	11
Buckley v. *Valeo*, 424 U.S. 1 (1976)	2, 10
California Medical Ass'n v. *FEC*, 641 F.2d 619 (9th Cir. 1980), aff'd, 453 U.S. 182 (1981)	10
Common Cause v. *Bolger*, 574 F. Supp. 672 (D.D.C. 1982), aff'd, 461 U.S. 911 (1983)	7, 11, 12
Flagg Bros. v. *Brooks*, 436 U.S. 149 (1978)	10
Froelich v. *FEC*, 855 F. Supp. 868 (E.D. Va. 1994), aff'd, 57 F.3d 1066 (4th Cir. 1995)	9
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992)	8, 9
Pipefitters Local Union No. 562 v. *United States*, 407 U.S. 385 (1972)	10
Simon v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976)	9
United States v. *Hays*, 115 S. Ct. 2431 (1995)	8
Whitmore v. *FEC*, 68 F.3d 1212 (9th Cir. 1995), cert. denied, 116 S. Ct. 1543 (1996)	8

Constitution and statutes:

U.S. Const.:	
Art. I	5, 6
Amend. I	2, 5, 6

Constitution and statutes—Continued:

	Page
Amend. V	5, 6
Federal Election Campaign Act of 1971, 2 U.S.C. 431-455	2
2 U.S.C. 437c(b)(1)	3
2 U.S.C. 437d(a)	3
2 U.S.C. 437d(e)	3
2 U.S.C. 437f	3
2 U.S.C. 437g	3
2 U.S.C. 437g(a)(1)	3
2 U.S.C. 437g(a)(2)	3
2 U.S.C. 437h	3
2 U.S.C. 441a	2
2 U.S.C. 441a(a)	3
2 U.S.C. 441b(a)	3
2 U.S.C. 441c(a)	3
2 U.S.C. 441e	3
2 U.S.C. 441f	3
2 U.S.C. 441g	3
39 U.S.C. 3210	5, 11
39 U.S.C. 3210(a)(1)	3
39 U.S.C. 3210(a)(2)	3
39 U.S.C. 3210(a)(4)	3
39 U.S.C. 3210(a)(5)(C)	3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 78 F.3d 66. The opinion of the district court (Pet. App. 9a-33a) is reported at 884 F. Supp. 685.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1996. The petition for a writ of certiorari was filed on June 10, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Election Campaign Act (FECA) of 1971, 2 U.S.C. 431-455, primarily to "limit the actuality and appearance of corruption resulting from large individual financial contributions." *Buckley* v. *Valeo*, 424 U.S. 1, 26 (1976) (per curiam). Congress sought to achieve that goal by, *inter alia*, limiting the amount of money that any individual or political committee may contribute to a candidate for federal office or to a political committee. 2 U.S.C. 441a. That limitation "focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free * * * to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." *Buckley*, 424 U.S. at 28. This Court has held that the FECA's specific limitations on the size of campaign contributions serve the compelling governmental purpose of preventing the "actuality and appearance of corruption" without unnecessary infringement of First Amendment rights. *Id.* at 26.[1]

As relevant here, the FECA (1) places dollar limitations on contributions by individuals and multicandidate political committees to candidates for federal

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[1] The Court in *Buckley* also upheld the FECA's disclosure requirements, which help, *inter alia*, to "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." 424 U.S. at 67 (footnote omitted). The Court struck down FECA provisions that limited expenditures by candidates from their own personal funds, limited total expenditures by candidates on their campaigns, and limited the amount of independent expenditures.

office and their political committees, 2 U.S.C. 441a(a); (2) prohibits congressional campaign contributions by national banks, corporations, labor organizations, and government contractors, 2 U.S.C. 441b(a), 441c(a); (3) prohibits contributions by foreign nationals, 2 U.S.C. 441e; (4) prohibits a person from making a contribution in the name of another, 2 U.S.C. 441f; and (5) limits the size of contributions made in cash, 2 U.S.C. 441g. The FECA neither requires candidates and their committees to accept, nor prohibits them from accepting, contributions from private persons, acting either individually or through political committees. Similarly, the FECA neither requires private persons to contribute to candidates for federal office nor prohibits them from doing so.

Respondent Federal Election Commission (FEC or Commission) is the independent federal agency charged with the administration, interpretation, and civil enforcement of the FECA. See 2 U.S.C. 437c(b)(1), 437d(a) and (e), 437f, and 437g. Congress has authorized the FEC to "formulate policy" under the Act, 2 U.S.C. 437c(b)(1), to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2), to initiate civil actions in the federal courts to obtain judicial enforcement of the Act, 2 U.S.C. 437c(b)(1) and 437d(e), and to initiate actions in the federal courts to determine the constitutionality of any provision of the Act, 2 U.S.C. 437h.

2. Members of Congress are permitted to send "franked" (*i.e.*, postage free) mail "in order to assist and expedite the conduct of the official business, activities, and duties of the Congress of the United States." 39 U.S.C. 3210(a)(1). The statute governing use of the franking privilege states that

> such official business, activities, and duties cover all matters which directly or indirectly pertain to the legislative process or to any congressional representative functions generally, or to the functioning, working or operating of the Congress and the performance of official duties in connection therewith, and shall include, but not be limited to, the conveying of information to the public, and the requesting of the views of the public * * * as a guide or a means of assistance in the performance of those functions.

39 U.S.C. 3210(a)(2). The franking privilege does not extend to "matter which in its nature is purely personal to the sender or to any other person and is unrelated to the official business, activities, and duties of the public officials covered," 39 U.S.C. 3210(a)(4), or to "mail matter which specifically solicits political support for the sender or any other person or any political party, or a vote or financial assistance for any candidate for any public office," 39 U.S.C. 3210(a)(5)(C).

3. Respondent Susan Molinari has represented New York's 13th Congressional District since 1990. Pet. App. 3a. In 1992, respondent defeated petitioner Sal Albanese, the Democratic Party's nominee, in the general election. *Id.* at 4a. Petitioner decided not to run for Congress in 1994 because he believed that he would be unable to raise enough money to conduct an effective campaign. *Ibid.* The other petitioners are registered voters of the 13th District who allege that they voted for Albanese in 1992 and that they would have supported him again if he had run in 1994. *Id.* at 4a, 12a. They claim to have financial resources too

modest to enable them to make substantial contributions of money to political campaigns. *Id.* at 5a.

Petitioners' amended complaint alleged that the "wealth primary," defined as "the exclusionary process of soliciting and using private dollars as a way to select candidates in federal elections," C.A. App. 27a, violates several provisions of the Constitution, see *id.* at 24a-25a, 27a-28a. The complaint also alleged that unspecified provisions of the FECA violate Article I and the First and Fifth Amendments by "allow[ing] for the solicitation and use of private money in federal elections." *Id.* at 26a. Petitioners also alleged that the congressional franking statute, 39 U.S.C. 3210, violates the same constitutional provisions "unless and until equal funds are appropriated to all declared qualified congressional challengers for use in making their views known to the electorate." C.A. App. 27a. Finally, they alleged that the salary, staff, and other assistance provided to respondent Molinari as a Member of Congress are unconstitutional subsidies to respondent as a candidate for re-election "unless and until such subsidies are shared equally by all other candidates for congressional office." *Ibid.*

The complaint alleged that the "exclusionary campaign finance process" or "wealth primary" (see, *e.g.*, C.A. App. 10a, 22a) had injured petitioner Albanese as a congressional candidate in 1992 because he lacked personal wealth and the access to wealth that assertedly are necessary for electoral success. The complaint alleged that respondent Molinari had received greater financial support than had petitioner, and that respondent had used those funds to finance communications that "drowned out" petitioner's own communications. *Id.* at 20a, 25a. The complaint further alleged that petitioner Albanese had decided not to

run again in 1994 because the "wealth primary" would prevent his "meaningful and equal participation as a candidate in the electoral process." *Id.* at 22a-23a.

Petitioners also alleged that they had been injured as registered voters. The solicitation and expenditure of contributions by congressional candidates in their district, the complaint alleged, violated petitioners' First and Fifth Amendment rights, C.A. App. 10a, 26a, and deprived them of their right to a United States House of Representatives "composed of Members chosen * * * by the people of the several States," in violation of Article I of the Constitution, C.A. App. 25a. The amended complaint sought a declaration that the "wealth primary" violates Article I and the First and Fifth Amendments (*id.* at 27a-28a); a declaration that the FECA is similarly unconstitutional "insofar as it allows for the solicitation and use of private money in federal elections" (*id.* at 28a); and a declaration that the congressional franking statute is unconstitutional "unless and until equal funds are appropriated to all declared qualified congressional challengers for use in making their views known to the electorate." *Ibid.*

4. The district court dismissed the amended complaint. Pet. App. 9a-33a. The court first held that petitioners lack standing to pursue their constitutional challenge to the FECA because "[t]he FECA's contribution limits cannot be directly traced to be the cause of Albanese's decision not to run for Congress," *id.* at 23a, and because petitioner Albanese had "opted not to participate in the election process; he was not prevented from doing so," *id.* at 24a. The case was therefore distinguishable, the court held, from prior cases in which "a candidate seeking to run for office was actually excluded by, typically, an insurmount-

able filing fee." *Ibid.* The court also found that petitioners had failed to establish the likelihood that a favorable judicial ruling would redress their alleged injuries. It explained that "if [petitioners'] goal is to eliminate the contribution of private funds to politicians and thereby level the electoral playing field, declaring the FECA—a statute which *limits* such contributions—unconstitutional cannot be said to redress [petitioners'] injury." *Id.* at 25a. The court also noted that petitioners' challenge to the FECA lacks merit, observing that "[t]he Court's reasoning in *Buckley* suggests that the essence of [petitioners'] challenge to the FECA has been considered and rejected by the Supreme Court." *Id.* at 25a-26a.

The district court also rejected petitioners' challenge to the franking privilege. In light of petitioner Albanese's decision not to run for Congress in 1994, the court deemed it "reasonable to suggest that * * * [petitioners'] challenge to the frank should be dismissed for lack of standing as was their challenge to the FECA." Pet. App. 29a. Even if petitioners were found to have standing, the court held, their claim lacks merit. *Ibid.* Relying on *Common Cause* v. *Bolger*, 574 F. Supp. 672 (D.D.C. 1982), aff'd, 461 U.S. 911 (1983), the court concluded that "[t]he conceded and undisputed legitimate interests [namely, consistent communication between citizens and their elected representatives] promoted by the franking statute are sufficient to justify the limited impacts on the rights of" petitioners. Pet. App. 31a (quoting *Common Cause*, 574 F. Supp. at 683).

5. The court of appeals affirmed. Pet. App. 1a-8a. The court concluded that petitioners lack standing to challenge the FECA. The court explained that "the injury [petitioners] assert is not 'fairly traceable' to

FECA" because "FECA does not require that contributions be made to any candidate." *Id.* at 6a. The court also found that petitioners had failed to show that their asserted injuries were likely to be redressed by a favorable ruling. "Indeed," the court observed, "since FECA limits the amount of contributions that are permissible, the elimination of those ceilings could well place candidates whose constituencies do not include a plethora of wealthy supporters at an even greater disadvantage." *Ibid.* The court did not discuss petitioners' challenge to the franking privilege, but it noted in its conclusion that it had "considered all of [petitioners'] arguments on this appeal and ha[d] found them to be without merit." *Id.* at 8a.

ARGUMENT

1. In order to establish standing to sue in federal court, a plaintiff must demonstrate (1) an "injury in fact" that is "concrete and particularized," not "conjectural" or "hypothetical"; (2) that there is a "causal connection between the injury and the conduct complained of"; and (3) that it is "likely," as opposed to "merely speculative," that the injury will be "redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotation marks and citations omitted). See also, *e.g.*, *United States* v. *Hays*, 115 S. Ct. 2431, 2435 (1995); *Allen* v. *Wright*, 468 U.S. 737, 751 (1984).

The decision of the court of appeals in this case that petitioners lack standing is consistent with decisions of other courts addressing similar claims. See, *e.g.*, *Whitmore* v. *FEC*, 68 F.3d 1212 (9th Cir. 1995) (dismissing for lack of standing constitutional challenge to out-of-congressional-district campaign contribu-

tions and to the FECA for failing to prohibit such contributions), cert. denied, 116 S. Ct. 1543 (1996); *Froelich* v. *FEC*, 855 F. Supp. 868 (E.D. Va. 1994) (similar), aff'd, 57 F.3d 1066 (4th Cir. 1995) (Table) (per curiam). No provision of the FECA has caused any injury to petitioners, and petitioners would not be better off if they received a judicial declaration that the FECA, or any provision of it, is unconstitutional.[2]

a. Rather than being "fairly traceable" to the Commission or the FECA, the contributions from which petitioners claim to have suffered injury were the result of independent, voluntary decisions by private persons. Individuals decided to contribute to respondent Molinari, and she in turn determined the manner in which those contributions would be spent. Petitioners have therefore failed to allege facts showing that their alleged injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Defenders of Wildlife*, 504 U.S. at 560 (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

Petitioners' challenge presumes that because the FECA regulates the amount and form of certain campaign contributions, it "authorizes," "control[s]," or "sanction[s]" (Pet. 18, 19) those contributions that it does not prohibit. This Court has made clear, however, that private conduct cannot be transformed into unconstitutional government action "by the simple

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[2] Petitioners fail to identify any particular provision of the FECA that they contend violates the Constitution. Instead, they rely on the conclusory assertion that the FECA "sanction[s] and control[s]" the "exclusionary campaign finance system" used in congressional elections. Pet. 19.

device of characterizing the [government's] inaction as 'authorization' or 'encouragement.'" *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 164-165 (1978). See also *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 391-394 (1972) (political committees predated the FECA); *California Medical Ass'n* v. *FEC*, 641 F.2d 619, 623 n.2 (9th Cir. 1980) (en banc) (contributions by individuals to political committees were not limited until passage of the FECA), aff'd, 453 U.S. 182 (1981). Cf. *Buckley*, 424 U.S. at 101 ("[p]lainly, campaigns can be successfully carried out by means other than public financing; they have been up to this date, and this avenue is still open to all candidates").

b. Petitioners have also failed to allege facts suggesting that their injuries would be redressed by a favorable judicial decision. They have identified no provision of the FECA the invalidation of which would redress their injuries. Rather, they have sought a declaration that the FECA is unconstitutional "insofar as it allows for the solicitation and use of private money in federal elections." C.A. App. 28a. A judicial declaration that the Act (or any part of it) is unconstitutional would not alleviate petitioners' alleged injuries, however, since it would not prevent private citizens from contributing to respondent Molinari or to other congressional candidates. To the contrary, as the court of appeals pointed out (Pet. App. 6a), invalidation of the FECA would simply permit contributors to donate even larger amounts of money to candidates.

Petitioners' alleged injury could be redressed only by the enactment of more stringent statutory limitations on campaign contributions than the FECA currently imposes. The courts below, however, could not have directed Congress to enact new legislation, and

it is entirely speculative whether and how Congress would act in response to a judicial declaration entered in a suit against the Commission. Because petitioners' alleged injuries could not have been redressed by a favorable judicial decision, the court of appeals correctly held that petitioners lack standing to pursue their claims.

Petitioners' reliance (see Pet. 19) on malapportionment cases such as *Baker* v. *Carr*, 369 U.S. 186 (1962), and civil rights cases such as *Brown* v. *Board of Education*, 347 U.S. 483 (1954), is misplaced. In those cases, the Court struck down specific statutory provisions that caused concrete injury to the plaintiffs. Petitioners, however, seek a judicial declaration that a statute that causes no injury to them is invalid because it fails to prohibit the conduct of others.

2. Petitioners also contend (Pet. 9-12) that the courts below erred in rejecting their constitutional challenge to the congressional franking privilege. They assert that the decisions below conflict with the decision of the three-judge court in *Common Cause* v. *Bolger*, 574 F. Supp. 672 (D.D.C. 1982), aff'd, 461 U.S. 911 (1983). Petitioners' argument is incorrect.[3]

Plaintiffs in *Common Cause*, like petitioners here, contended that the congressional franking privilege confers an unconstitutional electoral advantage upon incumbent Members of Congress. The three-judge

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[3] The Federal Election Commission has no role in the administration of the congressional franking privilege. The Commission took no position in the court of appeals regarding the constitutionality of 39 U.S.C. 3210, and it takes no position on that question in this Court. The argument on that question is presented on behalf of the United States as amicus curiae, which of course has an interest in defending Acts of Congress against challenges to their constitutionality.

court observed that it "d[id] not regard the issue of standing as a frivolous one and acknowledge[d] that there may be a legitimate concern over whether plaintiffs' limited showings are sufficient to establish standing." 574 F. Supp. at 679 n.11. The court nevertheless considered plaintiffs' claims on the merits and upheld the franking statute against the constitutional challenge, concluding that the line drawn by Congress between "official" and "unofficial" uses of the frank was a reasonable one. *Id.* at 683-685.

In the instant case, the district court suggested that petitioners' standing was doubtful in light of petitioner Albanese's decision not to run for Congress in 1994. Pet. App. 29a. Like the court in *Common Cause*, however, the district court proceeded to consider and reject petitioners' challenge on the merits. *Id.* at 29a-31a. The district court's approach was fully consistent with that of the three-judge court in *Common Cause*. The court of appeals did not discuss petitioners' challenge to the franking statute, but simply observed in its conclusion that it "ha[d] considered all of [petitioners'] arguments on this appeal and ha[d] found them to be without merit." *Id.* at 8a. That disposition creates no conflict in authority and does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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